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The Law of Maritime Boundary Delimitation between States: A History of its Development to the Present Day.

University — Université
Alberta

Degree for which thesis was presented — Grade pour lequel cette thèse fut présentée
Master of Laws

Year this degree conferred — Année d'obtention de ce grade 1984	Name of Supervisor — Nom du directeur de thèse Professor L.C. Green

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THE LAW OF MARITIME BOUNDARY DELIMITATION BETWEEN STATES: A HISTORY OF ITS DEVELOPMENT TO THE PRESENT DAY

by

© DONALD ROTHWELL

A THESIS
SUBMITTED TO THE FACULTY OF GRADUATE STUDIES
AND RESEARCH IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS OF THE DEGREE OF MASTER OF LAWS

FACULTY OF LAW

EDMONTON, ALBERTA
FALL, 1984

THE UNIVERSITY OF ALBERTA

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R G Ironside

Date: 5 June 84

ABSTRACT

This thesis looks at the law concerning the delimitation of maritime boundaries between states from the development of the modern maritime boundary until the present day. After having reviewed the development of the law to the stage where the territorial sea was a recognized maritime zone, emphasis will be placed on the original delimitation techniques as evidenced by the practice of states and the proposals of jurists. The work of the International Law Commission during the 1950's will be thoroughly considered, as also will be the 1958 United Nations Conference on the Law of the Sea. The impact of the delimitation provisions in the Convention on the Territorial Sea and Contiguous Zone and the Convention on the Continental Shelf, both products of the two bodies previously referred to, will be considered in the form of case studies dealing with maritime boundary delimitation awards and agreements. The work of the Third United Nations Conference on the Law of the Sea will also be reviewed and the impact of the 1982 Law of the Sea Convention will be discussed. As a result of this study it is intended to lay down guidelines so as to assist coastal states in their negotiations and agreements regarding the delimitation of the new extended maritime zones recognized in the 1980's by customary international law and the Law of the Sea Convention.

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ABBREVIATIONS

A.F.A.R.	Australian Foreign Affairs Record
A.J.I.L.	American Journal of International Law
A.Y.I.L.	Australian Yearbook of International Law
B.Y.I.L.	British Yearbook of International Law
C.T.S.	Consolidated Treaty Series (Parry's)
C.Y.I.L.	Canadian Yearbook of International Law
D.S.B.	Department of State Bulletin (United States)
H.I.L.J.	Harvard International Law Journal
I.L.M.	International Legal Materials
I.L.R.	International Law Reports
L.N.T.S.	League of Nations Treaty Series
S.D.L.R.	San Diego Law Review
T.I.A.S.	Treaties and Other International Acts Series
U.N.T.S.	United Nations Treaty Series
Va.J.I.L.	Virginia Journal of International Law

CHAPTER 1

"THE DEVELOPMENT OF MARINE BOUNDARIES"

1. INTRODUCTION

The development of the Law of the Sea has had a long and turbulent history, being influenced by the opinions of authors, the practice of States, and the proceedings of Conferences and their consequent Conventions. Over the centuries it has become accepted that coastal States are entitled to claim sovereignty and jurisdiction over the adjacent sea and seabed. These claims have been made for various purposes: originally the defence of the shoreline was the decisive factor, but the development of modern weapons has made that rationale obsolete; England sought to enforce offshore customs zones in the Eighteenth and Nineteenth Centuries by way of the various Hovering Acts[1] so as to combat the smuggling of European Goods; but in the Twentieth Century the emphasis has been on the development of various resource zones so that in the 1982 Law of the Sea Convention coastal States are entitled to claim a 200 mile Exclusive Economic Zone[2] and a Continental Shelf Zone which can extend 350 nautical miles offshore or 100 miles from the 2500 metre isobath[3].

As the claims of coastal States have been extended further out into the ocean the problem of overlapping ocean boundaries has become more acute. This is especially the case in those parts of the world in which island States lie offshore the large continents. Consequently, major disputes have arisen in the South-East Asian region where the large island archipelagoes which make up Indonesia, the Philipines and Japan lie close to Asia and Australia.[4] Problems also occur where adjacent States extend their land boundary into the ocean so as to divide their respective claims to the sea and seabed; this is especially so when the offshore areas contain rich natural resources in the form of fish and minerals. The disputes that have arisen between Canada and the United States and between the coastal States in the Persian Gulf and the Mediterranean Sea are representative of the problems adjacent States face in the delimitation of their respective maritime boundaries.[5]

In this first chapter the development of the law of the sea will be traced from the Seventeenth Century to the 1930 Hague Codification Conference, with emphasis on the emergence of the first universally recognized maritime zone. It was not until the acceptance of this first maritime boundary that the problem described above arose.

2. THE SEVENTEENTH CENTURY AND SOVEREIGNTY OVER THE SEA.

(a) The Influence of the jurists

One of the most tumultuous periods in the development of the Law of the Sea was the debate that occurred in the Seventeenth Century between the Dutch author, Hugo Grotius, and the Englishman, John Selden. Grotius in his work, "Mare Liberum"[6], advanced the theory that; "... the seas are avenues of commerce which of their nature are not susceptible of appropriation..."[7], and in doing so promoted the cause of those nations who favoured free access for their ships over the oceans.[8] Selden in "Mare Clausum",[9] published two years later, argued that the oceans were open to appropriation and control by coastal States who could regulate the movement of vessels within those waters.[10]

Whereas Grotius' 'Mare Liberum' is said to have finally prevailed, it could be argued that Selden's "Mare Clausum" has recently regained favour as more extensive maritime claims have been made to the oceans. This continuing debate led O'Connell to comment that the tension between these opposing points of view: "has waxed and waned through the centuries, and has reflected the political, strategic and economic circumstances of each particular age."[11], and that while: "In the context of history, the absolute freedom of the seas was relatively short-lived, and consistent with the naval supremecy of Great Britain. It was not finally established until the era of the suppression of the slave trade, and it has been overturned by the technological and economic revolutions of the United Nations era."[12]

While the Seventeenth Century is recognized as the period in which the modern law of the sea began to take shape, writers in the preceding 300 years such as Bartolus, Baldus and Bodin[13] all wrote in favour of the coastal state being able to extend sovereignty over the adjacent seas. These writers asserted that the coastal states had jurisdiction to a distance of 60 or 100 miles offshore, or the equivalent of two days journey by sea.

Fulton has also noted, that at one stage during this formative period of maritime boundaries, States applied the 'thalweg' or 'mid-channel' principle, which up till that time had been more commonly used in the delimitation of national river boundaries, to those seas which lay between two coasts. "In this way the mid-line in the sea lying between the coasts of two states was held to be the boundary of their respective maritime jurisdiction or sovereignty. The whole extent of a sea stretching between territories belonging to the same state, however far apart these territories might be, was looked upon as being under the sovereignty of that state. This principle, therefore, covered most extensive claims to maritime dominion, since it left hardly any part of the sea unappropriated."[14] The developments during this period led O'Connell to conclude: "By 1600, the idea of sovereignty itself had gained a firm grip on political and legal theory, and the formulation of the sovereignty of the seas during the following two decades was a plausible corollary to it. To that extent, the doctrine can be regarded as a Renaissance artifact."[15]

In Grotius' 'De Jure Belli ac Pacis Libri Tres', he develops the concept of sovereignty over the sea and the extent to which maritime boundaries can be claimed. Noting that it is possible to acquire a river by occupation he follows that example by writing: "... it would appear that the sea also can be acquired by him who holds the land on both sides, even though it may extend above as a bay or above and below as a strait, provided that the part of the sea in question is not so large that, when compared with the lands on both sides, it does not seem a part of them."16 He then goes on to note a few passages later, that: "It seems clear, moreover, that sovereignty over a part of the sea is acquired in the same way as sovereignty elsewhere, that is, as we have said above, through the instrumentality of persons and of territory. It is gained through the instrumentality of persons if, for example a fleet, which is an army afloat, is stationed at some point of the sea; by means of territory, in so far as those who sail over the part of the sea along the coast may be constrained from the land no less than if they should be upon the land itself."17

Another author whose writings had a great impact on the development of maritime boundaries was Bynkershoek, who in 1702 published his work 'De dominio maris.' Developing the concept of sovereignty over the seas in a manner akin to sovereignty over land, and noting the emphasis given by the law to the actual possession of territory, he concludes that the: "...sea should be understood as possessed only so far as it is navigated, and navigated perpetually."18 He continued by asking the question: "But who could navigate perpetually, and always be skirting the shores? Who could navigate with intent of ownership always, and always at the same interval from the land?"19 Bynkershoek concluded that: "I should think, therefore, that the possession of a maritime belt ought to be regarded as extending just as far as it can be held in subjection to the mainland; for in that way, although it is not navigated perpetually, still the possession acquired by law is properly defended and maintained; for there can be no question that he possesses a thing continuously who so holds it that another cannot hold it against his will. Hence we do not concede ownership of a maritime belt any farther out than it can be ruled from the land, and yet we do concede it that far; for there can be no reason for saying that the sea which is under some one man's command and control is any less his than a ditch in his territory."[20] It can then be seen that two of the leading authors on the law of the sea in the Seventeenth and Eighteenth Centuries were both of the opinion that it was possible to claim sovereignty over the seas and in their opinions we have the beginning of the acceptance by legal jurists of maritime boundaries.

(b) State Practice

As noted beforehand, many reasons have been advanced as to why it was necessary for a coastal State to claim sovereignty over a maritime zone and at the turn of the Sixteenth Century and during the Seventeenth Century, coastal States usually claimed such zones for either one of two purposes. The first was a zone of neutrality which surrounded the coastline and which required alien ships not to engage in warlike acts and to refrain from attempting to infringe upon the coastal State's sovereignty. The other purpose was to protect the coastal State's fishing resources and to allow local fishermen free access to the adjacent fishing grounds without competition from foreign fishermen. It was this latter factor which led to a Danish Ordinance of May 10, 1598 which provided that: "If any English vessels, contrary to the orders of the king, are found hovering and fishing in the waters between Vespeno and Iceland, or two Norwegian leagues (uker sjos) northeast from Vespeno, make all haste possible to capture them and bring them to Copenhagen."[21] Yet while the Danes asserted a maritime zone based on a precise measurement, other maritime States were asserting claims on the basis of the cannon-shot rule. It was the Dutch who first adopted this type of claim in 1610 after a delegation visited England to complain about a British proclamation which forbade 'strangers' from fishing in waters claimed as British seas. The Dutch responded by arguing: "For that it is by the lawe of nacions, no prince can Challenge further into the sea than he can Comand with a cannon except Gulfes within their Land from one point to an other."[22] In these two declarations are found the origins of a great academic debate that later raged over the origins of the three-mile territorial sea, which eventually became the accepted maritime boundary that coastal States could claim in customary international law. These examples of State practice are also indicative of the division between the precise maritime boundaries claimed by the Scandinavian States and the indefinite limits claimed by the Dutch and other Europeans up until the end of the Eighteenth Century.

In the early 1600's the Scandinavians expanded upon the two league claim through a variety of fishing zones which were proclaimed off their coastlines. In 1631 it was declared by the King of Denmark and Norway that: "... if any foreigners, whether whale hunters or English sea fishermen, come within four geographic leagues (mil), or if those from other nations come within six leagues of the coast, they shall be attacked."[23] Following the Dutch endorsement of the cannon-shot rule were the French, who Swartztrauber argues had adopted that limit by 1685. He noted that: "The capturing of ships as prizes of war had become a matter of significance during the Seventeenth Century and the French adapted the cannon-shot doctrine to suit this particular situation. They held that the range of cannon was the limit of territorial waters in matters of capture at sea, and that maritime acts of war would not be committed within range of neutral states' guns."[24]

But the French showed their ability to be flexible on this subject when a dispute arose between France and Denmark over the capture by a French privateer of two British ships in waters that were claimed by Denmark as territorial seas.[25] At this time the Danes claimed a one league territorial sea,[26] while the French claimed a neutrality zone based on cannon-shot. In the ensuing correspondence between the two countries, the Danes firmly maintained neutrality within the one league limit, and consequently the French departed from their claim based on cannon-shot and were prepared to accept the Scandinavian claim to a belt of neutral adjacent waters. While the French would not agree to the four mile - one Scandinavian league belt, they were prepared to accept a zone of one to three miles.[27] It is this event which the writers of the Twentieth Century emphasize in attempting to show that the three-mile limit was in fact a combination of the two prevalent maritime claims of the Seventeenth Century.[28]

At the end of this century, State practice indicates that more and more States were beginning to favour the concept of the 'open seas' and that Selden's 'closed sea' policy was losing favour. Fulton also has noted that there was a tendency: "... to substitute fixed boundaries in place of a wide and vague sovereignty, and to arrange by treaty defined limits for special purposes."[29] This practice increased during the Eighteenth Century as coastal States sought to secure greater protection for their coastlines and fishing grounds by concluding treaties with their neighbours.

Before concluding this review of the 1600's, it is instructive to again refer to the opinions of noted authors during this period. While Selden and Grotius were the leading writers of the century, the very nature of their work was such that neither considered the breadth of an adjacent sea that a coastal State could claim. While others such as Zouche, Loccenius, Stupmann and Puffendorf had nothing of merit to add to the writings noted earlier,[30] one writer who is worthy of mention is the Italian author Sarpi, who: "...formulated the opinion that the extent of territorial sea should not be fixed everywhere in an absolute manner, but should be made proportionate to the requirements of the adjoining state, without violating the just rights of other peoples. Thus a country or city which possessed large and fertile territories that provided adequate subsistence for the inhabitants, would have little need of the fisheries in the neighbouring sea, while one with small territories that drew a large part of its subsistence from the sea ought to have a much greater extent of sea for its exclusive use."[31] While Sarpi did not address himself to what the acceptable limit of such a maritime claim was, he does provide some suggestions for future consideration regarding the methods proposed in the Twentieth Century for the delimitation of claims between opposite and adjacent States.

3. THE EIGHTEENTH CENTURY: CANNON-SHOT OR THREE MILES?

(a) Bynkershoek and the cannon-shot rule

The single event which had the greatest impact on the development of maritime zones in the Eighteenth Century was the publication in 1702 by Cornelius Van Bynkershoek of his treatise, 'De Dominio Maris Dissertatio',[32] in which he gave consideration to whether coastal States were entitled to claim maritime belts off their coastlines, and, if so, to what extent. After concluding that coastal States could claim maritime belts[33] and having rejected the opinions of authors in the Seventeenth Century and the 'sight of land' doctrine,[34] he argued that: "... on the whole it seems a better rule that the control of the land (over the sea) extends as far as cannon will carry; for that is as far as we seem to have both command and possession. I am speaking, however, of our own times, in which we use those engines of war; otherwise I would have to say that in general terms that the control from the land ends where the power of men's weapons ends; for it is this, as we have said, that guarantees possession."[35] He reasserted his claim that: "... the territorial domain ends where the power of weapons terminates..."[36] in a later work written in 1737.

Subsequent writers have argued over what place Bynkershoek's writings should be given in the development of the cannon-shot rule and the eventual three-mile limit of territorial waters. For a long time Bynkershoek was credited with being the originator of the cannon-shot rule, but as has already been shown, the rule had been adopted by the Dutch for at least a century beforehand. Walker, in one of the first works to seriously study Bynkershoek's place in the development of the maritime boundary, noted that: "... it is clear that, for certain purposes at any rate, a cannon shot rule which Bynkershoek probably intended to adopt and approve rather than consciously to extend, was accepted as well established law in France, and most probably was equally well known in Dutch diplomatic practice. Bynkershoek may indeed be the earliest of the juristic writers to take notice of the rule; he may to some extent have generalized the rule accepted by certain countries in his day for limited purposes only; and he may have combined it in an attractive dress with the ideas of earlier writers. He may thus have helped not inconsiderably to popularise and secure wider recognition for the rule, but he can hardly be described as its originator."[37]

While it is important not to overstate the importance of Bynkershoek's writings on the cannon-shot rule, his overall impact on the development of the law of the sea during the Eighteenth Century should not be underestimated. Jessup has noted that: "... the value of Bynkershoek's maxim lay in the fact that it denied the ancient theory that the sea was incapable of appropriation without countenancing the excessively wide claims which had led to the Grotius-Selden controversy. The nations were unwilling to say that the free and common seas touched their very shores, and on the other hand they found it impracticable to claim dominion over vast oceans. Bynkershoek supplied the happy medium on a theoretical basis which appealed to the spirit of the times."[38]

(b) The Hovering Acts.

Swartztrauber[39] credits the first instance of the use of the three-mile limit as being the various zones set by English ports in their application of the Hovering Acts.[40] In Masterson's work on the development of the law which accompanied the Hovering Acts, he noted that under the

Act of 1718 the English authorities were able to visit ships lying or 'hovering' offshore; the distance varying according to the practice of the adjacent harbour.[41] The port of Yarmouth was the first to extend its jurisdiction over these 'hovering' ships to three-miles, when the limit on October 31, 1728 was: "... from Cromer church in the County of Norff, and by an imaginery line bearing north into the sea to the distance of three miles from the land..."[42] While it is correct to credit this instance as being one of the first occasions that a three-mile maritime zone had been enforced, it was only temporary and did not become a common limit. It was soon found that the 1718 Act[43] was not effective as the ships began to operate further offshore, and consequently in 1719 a further Hovering Act[44] was introduced which extended the limit to 2 leagues from the shore.[45] As a result, the three-mile limit at Yarmouth survived only eight years.[46] Since the intention of the Hovering Acts was to enforce English customs laws, they had to be flexible enough to be able to catch those ships which hovered further offshore: "Parliament realized that the law could not remain cast in some mould or frozen within the bounds of a fixed zone, there to remain impotent before the limits of smugglers who chose to hover just outside this zone. The laws were adjusted and readjusted to meet a nation's need. There was no principle of International Law to which they were made to conform."[47] By 1802 the customs jurisdiction under the Hovering Acts had reached four leagues.[48]

(c) State Practice

It was during the Eighteenth Century that the Scandinavians, who it was noted earlier had been the first to implement a maritime zone measured in definite terms, also began to claim maritime zones in distances of miles. Kent, in his work on the origins of the three-mile limit, traced this development to the introduction in 1743 of a four-mile fishing limit by the Governor of Finmarken in the northernmost part of Norway.[49] This was followed by the Danes in 1745 who claimed a one league neutrality zone.[50] The Swedes also declared a neutral maritime belt in 1758, but this was a three-mile limit, and is the first of its type recorded among the Scandinavian countries. In 1779 it was extended to four miles so as to be in conformity with the Danish one-league claim.[51]

Kent returns though to an incident in 1759 that occurred between the French and Danes over the capture of ships within waters claimed to be under Danish jurisdiction. At the time France claimed a neutrality belt based on the cannon-shot principle and found the continuous one-league maritime belt of the Danes contrary to its own policy. By 1761 though, "France was prepared to concede a continuous belt, though not one of four nautical miles, and suggested instead a width of three miles which was regarded as the possible range of cannon."[52] Kent concluded that in this instance: "...one finds the meeting of two separate principles in determining the extent of territorial waters: the principle of the continuous belt, and of the cannon-shot rule. The modern three-mile limit appears to have sprung from both, Danish practice contributing to it the concept of a continuous measured belt and the cannon-shot rule determining its width."[53]

(d) Other writers of the Century

Returning to the works of the noted publicists; in 1758 the Swiss author Vattel noted the difficulties in determining the extent of marginal waters that a coastal State could bring within its jurisdiction. Adopting a similar approach to that of Bynkershoek he wrote that: "Such claims of sovereignty are respected so long as the nation which makes them is able to maintain them by force; they cease when it can no longer do so. To-day the area of marginal seas which is within reach of a cannon shot from the coast is regarded as part of the national territory, and consequently a vessel captured under the cannon of a neutral fortress is not lawful prize."[54]

The next author of note is Fernando Galiani, who was the Secretary of the Sicilian Legation at Paris, and who proposed in 1782 that a continuous three-mile maritime belt would be an acceptable territorial limit for the nations. Walker sums up these proposals by noting that Galiani: "... states that various opinions had prevailed about the extent of the territorial sea, of which the most certain was that where the coast is not indented by bays but has an ordinary open coastline the area covered by the guns of any battery posted on the shore falls within the territorial jurisdiction of the adjacent land. He then concludes that it would be reasonable not to wait to see what forts a neutral sovereign might erect on a particular spot or what calibre of guns he might mount there, but to fix once and for all along the coast a limit of three miles as a limit beyond which no cannon could possibly reach."[55] This was indeed a significant development, as Galiani was the first writer to argue in favour of a continuous maritime belt over which the coastal State had sovereignty, rather than one based on the capacity of scattered coastal guns, and he also suggested a definite limit for this maritime zone. This work was followed by that of Azuni in 1795, a commercial judge in Nice, who also adopted the three-mile limit as being equivalent to the range of guns, and is credited with giving the term 'territorial waters' to the belt of sea a coastal State could claim.[56]

(e) The United States Declaration of 1793

To close the century there was the significant declaration by the United States of America of a three-mile neutrality limit in response to the war that had broken out between France and Great Britain in 1793. In a letter from Secretary of State Jefferson to both the British and French foreign ministers, he noted: "The greatest distance to which any respectable assent among nations has been at any time given, has been the extent of human sight, estimated at upwards of twenty miles, and the smallest distance I believe, claimed by any nation whatever, is the utmost range of cannon ball, usually stated at one sea league. Some intermediate distances have also been insisted on, and that of three sea leagues has some authority in its favour. The character of our coast, remarkable in considerable parts of it for admitting no vessels of size to pass near the shores, would entitle us, in reason, to as broad a margin of protected navigation as any nation whatever. Reserving, however, the ultimate extent of this for future deliberation, the President gives instructions to the officers acting under his authority to consider those heretofore given them as restrained for the present to the distance of one sea league of three geographic miles from the seashores."[57]

It can be seen that during the Eighteenth Century the law regarding maritime zones developed from the indefinite concept of an indeterminate zone based on the range of cannon scattered along the shore, to a continuous maritime belt of three-miles which enveloped the coastal state. The century saw the distinct practice of the Scandinavian States and other European powers such as France and the Netherlands being joined together in the writings of Galiani and Azuni and finally emerging into State practice with the declaration by the newly independent United States of America in 1793 of a three-miles zone of jurisdiction over their adjoining seas.

4. THE NINETEENTH CENTURY AND THE ACCEPTANCE OF MARITIME BOUNDARIES

Early in the Nineteenth Century the English Courts decided a series of cases which indicated that the three-mile limit had been adopted into English law for neutrality purposes. The most famous is the "Twee Gebroeders"[58], a case involving the capture of a ship which was alleged to have been in neutral waters at the time. In the decision of Sir William Scott, who was to later become Lord Stowell, the distance of three miles was equated with: "... the limits to which neutral immunity is usually conceded."[59] A similar approach was followed in an 1805 decision by the same judge,[60] in which a ship had been captured one-and-a-half miles from the shore in the mouth of the Mississippi River. It was noted with regard to the limits of neutrality that: "...since the introduction of fire-arms, that distance has usually been recognized to be about three miles from the shore."[61]

The full acceptance by the British of the three-mile limit, at least for fishing purposes, could be said to have been recognized in the 1818 Convention of Commerce between the United States and Great Britain. In that Convention, which specifically recognized the rights of American fishermen to fish in some British waters off the North American coast, it also provided: "And the United States hereby renounce for ever any Liberty heretofore enjoyed or claimed by the Inhabitants thereof, to take, dry, or cure Fish on, or within three marine Miles of any of the Coasts, Bays, Creeks, or Harbours of His Britannic Majesty's Dominions in America not included within the above mentioned Limits..."62 O'Connell saw the 1818 Convention as having a profound influence upon the development of the 'territorial sea', as it came to be known in the Twentieth Century, due to the acknowledgement by the United States and the predominant maritime power of that era of the utility of the three-mile limit. He noted that: "What had begun as a neutrality limit in 1794 had now become a fishing limit, and this assimilation of two jurisdictions, which throughout the eighteenth century has rarely been coincidental in fact, was the product of their rationalization by reference to the property theory of the territorial sea, embodied first in the notion of the cannon-shot and then in its supposed equivalent, the three-mile limit."63

Fulton, in his work on 'The Sovereignty of the Sea' drew attention to the various Fishing Conventions concluded among the European States in the Nineteenth Century and the role they played in the development of the territorial seas. Of note here is a royal decree by the King of the Netherlands which was issued in response to protests from England over the activities of Dutch fishermen off the main coast of Scotland. The decree prohibited the Dutch fishermen from approaching the coast within a distance of two leagues.64 This was followed by the 1839 Fisheries Convention between Great Britain and France in which both countries only asserted an exclusive jurisdiction of three miles for their fishermen in the Channel Island and the Granville Bay area.[65] A similar three-mile fishing zone was proclaimed in an 1852 Convention between Great Britain and Belgium.[66] Finally in 1882 the North Sea Fisheries Convention introduced a three-mile fisheries limit in which exclusive fishing rights could be claimed by the coastal State. The signatories were Great Britain, Germany, France, Belgium, Denmark and the Netherlands and this represented a mixture of countries who had previously claimed different maritime limits. Article Two of the Convention provided: "The fishermen of each country shall enjoy the exclusive right of fishery within the distance of 3 miles from low water mark along the whole extent of the coasts of their respective countries, as well as of the dependent islands and banks."[67]

A significant departure from the three-mile limit of maritime sovereignty was an 1821 Ukase issued by Tsar Alexander I of Russia, which provided: "It is therefore prohibited to all foreign vessels not only to land on the coasts and islands belonging to Russia as stated above, but also, to approach them within less than 100 Italian miles."[68] This led to a series of disputes with the United States and Great Britain and eventually resulted in Conventions being negotiated in 1824[69] and 1825[70] in which Russia gave up her 1821 Ukase Declaration.[71] For the remainder of the Nineteenth Century the Russians generally adhered to the three-mile rule.[72]

In 1876 the English Courts had to decide on whether the criminal jurisdiction of England extended to acts which occurred within the three-mile zone. This resulted in the land-mark decision of R. v. Keyn[73], which was based on a charge of manslaughter against the Captain of a German ship which arose from the loss of life which occurred upon the collision of that ship with an English ship in the territorial seas of England. The actual decision of the court, by the majority of seven to six, was that since the territorial waters were outside the realm, the matter fell to be decided by the Admiralty courts, but that since those courts had no jurisdiction over aliens, then the charge could not be heard in an English court. As a consequence of this decision the Territorial Waters Jurisdiction Act[74] was enacted in 1878 in an attempt to rectify this defect in the jurisdiction of the English courts so as to extend criminal jurisdiction over the three-mile limit. Irrespective of the actual decision, the judges in the case recognized that the territorial waters of a coastal State were not only an area in which neutrality or fishing rights could be claimed, but one which had blossomed into a zone of complete sovereignty. Lindley J. noted that: "... subject to the right of all ships freely to navigate the high seas, every state has full power to enact and enforce what laws it thinks proper for the preservation of peace and the protection of its own interests, over those parts of the high seas which adjoin its own coasts and are within three miles thereof."[75]

Swartztrauber noted that as a consequence of the Territorial Waters Jurisdiction Act which followed R. v. Keyn, and the 1876 Customs Consolidation Act[76] and 1883 Sea Fisheries Act,[77] which all implemented three-mile limits, that: "Britain publicly and internationally limited herself to a three-mile limit for all purposes. From that time, she maintained the policy that the territorial sea within three miles was the maximum extent for state jurisdiction irrespective of the state's ability or power to extend its authority farther."[78] The development of the law in England during the Nineteenth Century was shadowed by that in the United States, so that in a 1890 decision of the Massachusetts Supreme Court it was held that: "We regard it as estabished that, as between nations, the maximum limit of the territorial jurisdiction of a nation over tide waters is a marine league from its coast...."[79]

With respect to the opinions of authors in the Nineteenth Century, a small sampling shows that the cannon-shot rule was still accepted but that this had now become equated with the three-mile limit. Phillimore, in following the approach that the margin of territorial waters was based on the cannon-shot rule, noted that due to improvements in artillery it may be desirable for the three mile limit to be extended.[80] What was significant was the acceptance of the general jurisdiction that a coastal state could exercise within its territorial waters, so that it was no longer a boundary claimed for a specific purpose which could lapse in the future if no longer required. Wheaton wrote that: "Within these limits, its rights of property and territorial jurisdiction are absolute, and exclude those of every other nation."[81]

5. 1900 TO THE HAGUE CONFERENCE

As a consequence of the developments of the Nineteenth Century and the impact that British practice had on the development of maritime laws during this period, it comes as no surprise to note that during the early decades of the 1900's the three-mile limit of territorial waters was adhered to by a majority of coastal states.[82] Yet there were signs that though unanimity had nearly been achieved, the attitudes of a few states were sufficient to cast doubt over whether the limit would survive for too many years. O'Connell noted that jurists also disagreed over the exact extent of territorial waters and that by the outbreak of World War I many authors believed that the three-mile limit had lost its rationale. In discussing this division of juristic opinion, he wrote: "There were still, however, many who believed that the three-mile limit had been pragmatically detached from the cannon-shot standards, while others supported alternative limits sanctioned by national legislation, such as the Spanish six-mile limit, and on occasion a multiplicity of limits for different purposes. In short, during the critical period from 1876 to 1914, thirty-three jurists believed that the territorial sea expanded with the evolving range of artillery; twenty-six believed that State practice had established it at three miles; five proposed other fixed limits; five argued for different limits for different purposes; eight ambiguously referred to both the three-mile limit and the cannon-shot; and seven thought that there was no consensus on the matter."[83]

With the formation of the League of Nations after World War I, a movement began towards the codification of certain areas in international law, and one of those was the emerging Law of the Sea. In preparation for a future Conference on the Codification of International Law, various associations which dealt with International Law began to discuss the matters which could be debated at such a Conference and prepared draft articles. O'Connell noted that during the period from 1915 to the 1930 Hague Conference a great majority of authors on international law supported the concept of territorial waters and the three-mile limit[84], and this is confirmed by both the reports prepared in 1926 by the International Law Association[85] and the Committee of Experts of the League of Nations.[86] Similar proposals are found in the 1929 Draft prepared by the Harvard group on Research in International Law, which provided: "The marginal sea of a state is that part of the sea within three miles (60 to the degree of longitude at the equator) of its shore measured outward from the mean low water mark or from the seaward limit of a bay or river mouth."[87]

When the Second Committee of the 1930 Hague Conference eventually came to consider the issue of the breadth of territorial waters many problems arose in attempting to reconcile the divergent approaches taken by different States. The Conference was also hampered by the assumption that a single territorial belt of three miles would be suitable for customs, fishing, criminal and sovereignty purposes. Yet while this proved to be the case for maritime powers such as Great Britain and the United States, it was not generally acceptable to many European powers.[88] Consequently, the Conference ended with no determination of the extent of territorial waters. "The primary reason for this failure was that Great Britain and a few other staunch advocates of the three-mile limit refused to recognize either the rights of a coastal state to exercise jurisdiction in a contiguous zone, or the historical claims of some Scandinavian countries to a league of four miles as the breadth of their territorial seas. This uncompromising attitude antagonized many countries who were willing to codify the three-mile or one-league limit. As a result, the Conference became so deadlocked that it never took a formal vote on the breadth of the territorial sea."[89]

6. CONCLUSION

As can be seen from the above review of the law as it developed over a period of 300 years, the major issues that arose among the nations and the publicists were the extent of the territorial sea and for what purposes it could be used. It seems to have been generally accepted by the practice of states and the writings of people such as Bynkershoek, Galliani, and Azuni in the Eighteenth Century that coastal States could extend their land boundaries into the surrounding coastal waters for certain purposes. At first these sea boundaries were claimed for either fishing or neutrality reasons, but through the various pieces of customs legislation and the extension of criminal jurisdiction to aliens in these waters, the territorial sea zone developed into an area in which states asserted sovereignty similar to that over land. The major conflict concerned the distance over which this sovereignty could be legitimately asserted. While the cannon-shot rule had great support in the Eighteenth and Nineteenth Century, and Fulton claimed that there was near universal support for the rule in the early 1900's[90], the rule was based on the fictitious assertion that the coasts were dotted with cannon which would enforce the coastal State's sovereignty and was also plagued by the uncertainty of the current range of cannon, which depended on the state of technology.

From the time of the proclamation by the United States in 1793 of a three-mile limit, that distance gained increasing popularity, so that in 1927 Jessup was able to assert: "Upon a consideration of all the evidence, therefore, the present writer is of the opinion that the three-mile limit is today an established rule of international law."[91] Though the 1930 Hague Conference was unable to decide upon a three-mile limit, this was more due to a disagreement over the need for a separate zone for customs and fishing purposes rather than the non-recognition of a three-mile territorial sea. What can be concluded is that during the early part of the Twentieth Century, coastal states were fully entitled by customary international law to claim maritime zones off their shoreline and that as a consequence of this lawyers and geographers began to realize that the delimitation of maritime boundaries when they overlapped or were adjacent to each other would have to be addressed. This shall be the topic of the next chapter.

FOOTNOTES

1 See: 9 Geo. II, c.35; 24 Geo III.,c.47; and; Masterson, Jurisdiction in Marginal Seas with Special Reference to Smuggling (1929). The 'Hovering Acts' refer to the numerous pieces of English legislation passed in the Eighteenth and Nineteenth Centuries to combat the smuggling of goods from ships which 'hovered' off the English coast.

2 See: Part V, especially Article 57; U.N. Convention On the Law of the Sea, U.N. Doc. No. A/CONF. 62/122.

3 Ibid. Article 76

4 See: Prescott, Maritime Jurisdiction in Southeast Asia: A commentary and Map (1981)

5 Case studies of various maritime boundary disputes will be conducted in Chapter 5

6 Grotius, Mare Liberum (The Freedom of the Seas or The Right which belongs to the Dutch to Take Part in the East Indian Trade) (1033), translated by Magoffin (1916)

7 O'Connell, The International Law of the Sea: Volume 1, ed. Shearer, 9(1982)

8 Grotius did accept that a coastal State was entitled to claim a small strip of the adjacent sea, but not the whole ocean; See: Infra. , n.17.

9 Selden, Mare Clausum (The Right and Dominion of the Sea) (1635)

10 See: for a more detailed discussion of the 'Grotius - Selden' debate over the 'freedom of the seas', Op Cit. O'Connell, p. 1 - 18; Fulton, The Sovereignty of the Sea, 338 - 377 (1911).

11 Op Cit. O'Connell, p.1

12 Ibid. p. 1, 2, See: Article 17,37,87,90, 136. United Nations Convention on the Law of the Sea, supra. n.2; for the current law of the 'freedom of the seas'

[13] See: Ibid. O'Connell, p. 2 - 9; also, Ibid. Fulton, 537 - 543

[14] Ibid. Fulton, p. 542

[15] Op Cit. O'Connell, p. 3

[16] Grotius, The Law of War and Peace: De Jure Belli ac Pacis Libri Tres (1652), translated by Kelsey (1925), Book II, CH. III: VIII-2, p. 209

[17] Ibid. Book II, CH. III: XIII-2, p. 214

[18] Bynkershoek, De Dominio Maris Dissertatio (The Dissertation on the Sovereignty of the Sea) (1702), translated by Deman (1964), Ch. II - 363, p. 42

[19] Ibid.

[20] Ibid. p. 43

[21] Swartztrauber, The Three-Mile Limit of Territorial Seas, 16 (1972), quoting from Crocker, Marginal Seas, 513, (1919)

[22] Op Cit. Fulton, p. 156, quoting, Great Britain, State Papers, Domestic, vol. 47, p. 111

[23] Op Cit. Swartztrauber, p. 45

[24] Ibid. p. 26; See: Walker, Territorial Waters: The Cannon Shot Rule, 22 (1945) The British Yearbook of International Law, 210 at 215

[25] Ibid. p. 54

[26] The 'League' claimed by the Scandinavian countries was equivalent to four nautical miles.

[27] Kent, The Historical Origins of the Three-Mile Limit, 48 A.J.I.L. 537 at 543 (1954). See: Jessup, The Law of Territorial Waters and Maritime Jurisdiction, 18, (1927); Op Cit. Swartztrauber, p. 54.

[28] See: Op Cit. Kent, p. 548 - 553; Walker, p. 231

[29] Op Cit. Fulton, p. 554

[30] See: Op Cit. Swartztrauber, p. 27 - 28

31 Op Cit. Fulton, p. 547, quoting from, Dominio del Mar' Adriatico e sue Raggione per il Jus Belli della Serenissima Republica di Venetia, (1686)

32 Supra n. 18

33 Supra n. 20,

34 For an explanation of the 'sight of land' or 'land kenning' doctrine; See: Fulton, p. 545

35 Op Cit. Bynkershoek, Ch. II - 365, p. 44

36 Bynkershoek, Quaestionum Juris Publici Libri Duo (On the Question of Public Law - Two Books) (1737), translated by Frank (1930), Book 1: Ch. VIII - 59, p. 54

37 Op Cit. Walker, p. 211

38 Op Cit. Jessup, p. 7

39 Op Cit. Swartztrauber, p. 51 - 52.

40 Supra. n. 1

41 Op Cit. Masterson, p. 10

42 Ibid.

43 5 Geo. I., c. 11

44 6 Geo. I., c. 21

45 Op Cit. Masterson, p. 12

46 Op Cit. Swartztrauber, p. 52

47 Op Cit. Masterson, p. 58

48 Ibid. p. 67

49 Op Cit. Kent, p. 544

50 Ibid. p. 545

51 Ibid. p. 550

52 Ibid. p. 548

53 Ibid. p. 549 - 550

[54] Vattel, *Le Droit des Gens, au Principles de la Loi Naturelle, appliques a la Conduite et aux Affaires des Nations et des Souverairs* (The Law of Nations or the Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and of Sovereigns), Vol. 3 (1758), translated by Fenwick (1964), Ch. XXIII - 289, p. 109

[55] Op Cit. Walker, p. 228 - 229

[56] *See:* Op Cit. Fulton, p. 565; and, Oudendijk, *Status and Extent of Adjacent Waters: A Historical Orientation*, 145 - 146 (1970)

[57] Moore, *A Digest of International Law,* Volume 1, 702 (1906)

[58] 3 (1800) C. Rob 162, 165 E.R. 422

[59] Ibid. p. 423.

[60] *The Anna, La Parte*, (1805) C. Rob 573

[61] Ibid. p. 385b.

[62] Article 1, Convention of Commerce between Great Britain and the United States, signed at London. 20 October 1818, 69 (1818 - 1819) *C.T.S.* 293

[63] Op Cit. O'Connell, p. 134

[64] Op Cit. Fulton, p. 605 quoting from *Reports by the Commissioners for the British Herring Fishery for 1819, 1821, 1822.* *Note:* two Dutch Leagues were equivalent to six miles.

[65] Convention between France and Great Britain for defining the Limits of Exclusive Fishing Rights, signed at Paris, 2 August 1839, 89 (1839 - 1840) *C.T.S.* 221.

[66] Convention between Belgium and Great Britain relating to Fishing, signed at London, 22 March 1852, 107 (1851 - 1852) *C.T.S.* 457

[67] Convention between Belgium, Denmark, France, Germany, Great Britain and the Netherlands for regulating the Police of the North Sea Fisheries, signed at The Hague, 6 May 1882, 160 (1882) *C.T.S.* 219. *See:* Op Cit., O'Connell, p. 137 - 139; Fulton, p. 632 - 638

68 Op Cit. Swartztrauber, p. 73 quoting from United States Congress, Senate, Proceeding of the Alaskan Boundaries Tribunal, vol. 1, pt. 2, p. 9 - 10.

69 Convention regulating Navigation, Fishing, Trading, and Establishment on the Northwest Coast of America between Russia and the United States, signed at St. Petersburg, 17 April 1824, 74(1824) C.T.S. 135

70 Convention between Great Britain and Russia concerning the Limits of their Respective Possessions on the North-West Coast of America and the Navigation of the Pacific Ocean, signed at St. Petersburg, 16 February 1825, 75 (1824 - 1825) C.T.S. 95

71 Op Cit. Swartztrauber, p. 73

72 Ibid. p. 74

73 (1876) 2 Ex.D. 63

74 41 and 42 Vict., c. 73

75 Supra n. 73, p. 89

76 39 & 40 Vict., c. 36

77 46 & 47 Vict., c. 22

78 Op Cit. Swartztrauber, p. 71

79 Commonwealth v. Arthur Manchester 152 (1890) Mass. 230, 240.

80 Phillimore, Commentaries upon International Law, Vol. 1, 3rd Ed., 276 (1879).

81 Wheaton, Elements of International Law: with a sketch of the History of the Science, 142 - 143 (1836)

82 See: Op Cit. Swartztrauber, p. 116; and Heinzen, The Three-Mile Limit: Perserving the Freedom of the Seas, 11 (1958 - 1959) Stanford Law Review, 597 at 632

83 Op Cit. O'Connell, p. 153 - 154.

84 Ibid. p. 156

85 Article 5: Report of the Neutrality Committee of the International Law Association, 34 (1926) Report of the International Law Association, 42.

86 Article 2: Draft Convention on Territorial Waters of the Committee of Experts for the Progressive Codification of International Law of the League of Nations, 20 (Special Number) (1926) A.J.I.L. Supp.141

87 Article 2: Draft of Convention on Territorial Waters, in, Research in International Law, Harvard Law School, Nationality, Responsibility of States, Territorial Waters: Drafts of Conventions Prepared in Anticipation of the First Conference on the Codification of International Law, 243 (1929)

88 See: Minutes of the Second Committee: Territorial Waters, in, League of Nations: Conference for the Codification of International Law 1930, Volume Four, ed. Rosenne, p. 1214-1259 (1975).

89 Op Cit. Heinzen, p. 637

90 Op Cit. Fulton, p. 688 - 689

91 Op Cit. Jessup, p. 66

CHAPTER 2

"THE EARLY DELIMITATION OF MARITIME BOUNDARIES BETWEEN STATES: THE PRACTICE OF STATES AND WRITINGS OF JURISTS"

1. INTRODUCTION

Now that it has been established that maritime boundaries in the form of customs, neutrality, fishing and territorial zones were accepted and proclaimed by coastal States for at least 300 years prior to the Twentieth Century and that by the time of the 1930 Hague Conference many states had claimed offshore territorial waters, it is possible to discover how the States coped when these new boundaries in the sea overlapped and had to be defined. This Chapter will, therefore, concentrate on State practice prior to and after the 1930 Hague Conference, and also the work of the Conference itself.

Before this review is begun, it is instructive to consider the different stages which take place in the development of a boundary. A political geographer, Jones, who wrote on the subject has noted that: "In respect to governmental processes, there are four main stages in the history of a boundary: (1) Political decisions on the allocation of the territory, (2) delimitation of the boundary in a treaty, (3) demarcation of the boundary on the ground, and (4) administration of the boundary. Chronologically, these stages may overlap, may succeed each other promptly, or may be separated by gaps of many years."[1] Since the first stage of the process has been reviewed in

Chapter One, it is possible to now consider the second stage, that of delimitation. Jones defines delimitation as: "...the choice of a boundary site and its definition in a treaty or other formal document. It is more precise than the general allocation of territory which preceded it, but less precise than the demarcation which usually follows. The choice of a boundary site may be a compromise between geographical suitability and political necessity. The first phase of delimitation is, therefore, both science and art. The definition, however, is a purely technical process that should, and can be carried out with scientific exactitude."[2]

2. STATE PRACTICE PRIOR TO 1930

(a) The 'middle of the seas'

As noted in the first chapter, the theory of the 'mid line' or 'middle of the seas' had been used at one stage in the apportioning of the seas to the adjacent States.[3] This theory was an extension of the 'thalweg' or 'middle of the stream' principle which had long been in use as a method to delimit rivers that formed international boundaries. A good summary of that original theory is found in an 1893 decision by an American Court: "When a navigable river constitutes the boundary between two independent states, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each state in the navigation of the river admits of no other line. It is, therefore, laid down in all the recognized treatises on international law of modern times that the middle of the channel of the stream marks the true boundary between the adjoining state up to which each state will on its side exercise jurisdiction."[4]

Fulton has traced the use of the 'mid-line' back to King Cnut's Charter in 1023, which granted to the Church of Canterbury the port of Sandwich in Kent and the rights to certain wrecks up to the middle of the sea.[5] Note should also be made of a book written by Andrew Horn at the end of the Thirteenth Century, in which it was claimed that: "...the king's sovereign jurisdiction extended as far as the middle line of the sea surrounding the land."[6] A similar thought was expressed by Plowden, a lawyer, who in the 1575 case of Att. v. Sir John Constable argued that: "... the bounds of England extend to the middle of the sea adjoining which surrounds the realm."[7] Two years later, the English author, Dr. John Dee also wrote that the limit of the English seas extended to the mid-line between the English and foreign coasts, except in the case of the English Channel where it was believed the limit extended up to the opposite shore.[8] While these cases all came before the 'Freedom of the seas' debate in the Seventeenth Century, they do provide a valuable insight into the delimitation methods proposed before the development of the 'modern' maritime boundary in later years, and it will be seen that the 'mid-line' or 'middle of the seas' principle survived and became popular again during the Nineteenth Century.[9]

(b) United States - Canada Boundary disputes

Of all the international boundaries in the world, that between the United States and Canada has been considered one of the most peaceful. Yet while the land boundary is well settled, the maritime boundary is not, and currently there are three disputes between the two countries over their maritime boundaries in the Gulf of Maine on the East Coast, the Dixon Entrance off the West Coast and the boundary along the 141° meridian between Canada and Alaska that runs into the Beaufort Sea.[10] As La Forest has noted: "Even a fleeting look at the map of North America reveals how important the settlement of conflicting interests regarding international waters is to Canada - United States relations. Of the 3,500 mile boundary extending from Passamaquoddy Bay on the Atlantic Ocean to the Strait of Juan de Fuca on the Pacific, at least 2,000 miles consist of waters."[11] The delimitation of the boundary in Passamaquoddy Bay and the Strait of Juan de Fucca shall now be traced from the 1783 Treaty of Peace till the 1930 Hague Conference.

(i) The Passamaquoddy Boundary

The 1783 Treaty of Peace between the United States and Great Britain, which provided in Article II for the delimitation of the boundary from the Atlantic Ocean to the Mississippi River, noted that the boundary ran: "East, by a line to be drawn along the middle of the river St. Croix, from its mouth in the Bay of Fundy to its source."[12] While this initial treaty did not provide for the determination of the ownership of the islands in Passamaquoddy Bay, which would have given a guide as to the future direction of the sea boundary, it is significant that in those parts of the treaty where the boundary is said to pass through water in the form of either lakes or rivers, the middle line is always chosen.[13] Following the War of 1812 a further Treaty of Peace was signed in 1814 which established a Commission to determine the ownership of the islands in Passamaquoddy Bay.[14] This issue was finally resolved in 1817 when the two Commissioners submitted an equitable decision which was accepted by both parties.[15] This then paved the way for the 1818 Convention of Commerce which defined the fishing rights of the United States off the English shoreline and in the Bay of Fundy, Gulf of Maine, Nova Scotia and Newfoundland. The treaty formally established the three-mile fishing zone in English-American relations and so necessitated the delimitation of these claims off their respective shores.[16]

In 1822 a case came before the Circuit Court of the District of Maine[17] concerning the seizure of a ship in Passamaquoddy Bay by American authorities after a dispute had arisen as to whether the seizure had actually taken place in American waters. Justice Story decided the case on general principles, and after referring initially to the 'middle of the stream' theory which was applied to river boundaries, he noted that in some cases this principle may be applicable to the whole of a river or a bay which is common to both nations. He noted: "A river or bay may be so narrow, or irregular, or so liable to difficulties from winds, waves, and currents, that it cannot be navigated by either nation without the necessity of the right of passing over the whole waters at all time. If, in such a case no exclusive right is recognized in either nation, the constant use by both is conclusive proof of a common right of passage and navigation in both."[18] It was concluded that while the waters of the bay were common for the right of passage and navigation, that: "In truth the law of nations, must, under such circumstances, be presumed silently to prevail, and annex the bay to the middle of the stream to the territories of the adjacent provinces..."[19]

In 1842 the Webster-Ashburton Treaty[20] was signed with the intent of creating a series of Commissions to investigate boundary problems. This Treaty matched the 1783 treaty in failing to provide for the formal extension of the land boundary into the sea through Passamaquoddy Bay[21] and as a consequence it was not until late in the century that this issue was effectively addressed.

(ii) The San Juan Island Dispute

While the eastern maritime boundary between the United States and Canada took many years to settle, the western boundary was effectively settled in less than thirty years, but not until there had been a fierce diplomatic dispute which at times could easily have flared into war. The 1846 Oregon Boundary Treaty was the catalyst for this disagreement when it provided for the land boundary to continue its present course along the forty-ninth parallel till it reached the Straits of Georgia, at which point it would continue: "westward along the said forty-ninth parallel north latitude to the middle of the channel which separates the continent from Vancouver Island; and thence southerly through the middle of the said channel, and of Fuca's Staits to the Pacific Ocean;..."[22] It was soon realized that the presice determination of the boundary through the middle of the channel between the Continent and Vancouver Island was complicated by the presence of islands in the channel and that while several navigation routes existed between Georgia Strait and Juan de Fuca Strait there was no direct mid-channel. This led to a dispute over the ownership of San Juan Island, which was claimed by both countries and was the scene of many skirmishes between opposing troops after the shooting of a British pig by an American in 1859.[23]

The British claimed that the middle of the Channel followed Rosario Strait, which was to the east of San Juan Island, while the United States claimed the channel which ran to the west of the Island through Haro Strait. Though the ownership of the island seemed to lie at the centre of the dispute as to where the boundary lay, the main consideration was probably that of obtaining the best navigation channel through the islands. This was especially so for the British who did not want maritime access cut off from the Pacific Ocean to the British Columbia mainland via the Juan de Fuca Strait and Georgia Strait. Classen noted that: "The chart also showed that neither Rosario nor Haro Strait corresponded to the geometric middle line between Vancouver Island and the mainland. The geometric middle ran straight through the San Juan Islands. If anyone had really wished to make the boundary run along a line equidistant from Vancouver Island and the continent, he would have had to choose the minor, meandering channel cutting through the archipelago."[24] At one stage in the dispute the British made a compromise offer which provided for the boundary to run on a line with San Juan Island to the west and the Orcas and Lopez Islands to the east, and yet while this suggestion would have given to each country the rights of navigation over one of the two navigable channels through the islands, it was rejected by the United States due to their desire not to lose possession of San Juan Island, which as Classen noted had by that stage become an issue of national honour.[25]

Eventually in 1871 the parties agreed to submit the dispute to an arbitrator, and appointed Emperor William I of Germany to determine the matter.[26] The German Government appointed three experts to decide the case and delivered an award in Berlin on October 21, 1872, which sustained the claim made by the United States.[27] On November 25 the British garrison on San Juan Island was abandoned[28], and the following year a treaty was concluded which put into effect the arbitration decision. The consequent boundary is very precise, providing for the forty-ninth parallel land boundary to continue: "... to the middle of the Channel which separates the Continent from Vancouver Island," and then south to a point at which it follows the course of Haro Strait passing 'equidistant' and 'midway' between the respective Canadian and United States' islands until it reaches the Strait of Juan de Fuca where it runs through the centre of the Strait in a direction "equidistant in a straight line" between points of the opposite shores, terminating "...about 30 3/4 miles to the Pacific Ocean at a point equidistant between Bonilla Point on Vancouver Island and Tatooch Island lighthouse on the American Shore - the line between the point being nearly due North and South (true)."[29]

(iii) Settlement in Passamaquoddy and Fundy Bays

At an 1892 Conference between Canada and the United States it was agreed to more accurately determine the boundary through the waters of Passamaquoddy Bay, and this matter eventually fell to be decided by the Joint High Commission, which was a body established in 1898 to determine boundary and other disputes between the two countries. The Commission though, failed to determine the Passamaquoddy boundary as it became deadlocked on the settlement of the land boundary between Alaska and Canada, and it did not reconvene after March 1899.[30] Undeterred by this failure an International Waterways Commission was later established to investigate those lakes and rivers through which the international boundary ran and this eventually led to the establishment of the International Joint Commission[31] which was an organization: "... of larger powers adequate to the satisfactory adjustment of the annoyingly frequent problems arising from American - Canadian geographic and political relationships - especially from the increasing controversies concerning water supply, water power and waterways."[32]

While the Waterways Commission did not deal with the maritime boundary disputes between the two countries, it did concern itself with issues which required the application of similar principles for their determination. In a 1907 Report on the location of the boundary line through Lake Erie, it noted that the expression 'middle of the lake' could mean: "(a) A line being at all points equally distant from each shore; (b) A line following the general lines of the shores and dividing the surface water area as nearly as practicable into two equal parts; (c) A line along the mid-channel dividing the navigable portion of the lake, and being at all points equally distant from the shoal water on each shore."[33] This report is, in its use of delimitation terms, similar to the arbitration award concerning the dispute over the boundary between Georgia Strait and the Strait of Juan de Fuca and is representative of the growing practice of attempting to define a boundary in equitable terms.

By 1908 the troublesome boundary in Passamaquoddy Bay had still not been satisfactorily defined[34], and in that year a treaty was concluded which provided for its delimitation. The agreement provided for the appointment of expert geographers or surveyors to define and mark the boundary, with provision for the matter to be referred to an international arbitration if a mutual decision could not be reached.[35] The appointed Commissioners completed their task in the allotted time and in 1910 a treaty was concluded which provided for the International Boundary to run from a point in Passamaquoddy Bay which had been previously determined: "...as lying between Treat Island and Friar Head, and extending there through Passamaquoddy Bay and to the middle of Grand Manan Channel..."[36] The various turning points of the boundary were laid down, so that it became a series of seven straight lines which passed between the American mainland and the Canadian Islands which were at the mouth of Passamaquoddy Bay. It was later discovered that the boundary provided for by this treaty terminated at a distance less than three miles from the Canadian territory of Grand Manan Island and the American State of Maine, and consequently there was a small area of territorial waters in which controvertible juridiction existed. This defect was remedied by the extension of the existing boundary: "... for a distance of two thousand three hundred eighty-three meters, through the middle of Grand Manan Channel, to the High Seas."[37] So it was in 1925 that the maritime boundaries between the two countries were finally settled, but as noted earlier, with the development of further maritime boundaries due to the general acceptance of continental shelf claims, these two countries again began to argue about the placement of their maritime boundaries at a later date.

(c) The United States and Mexico

Considering the preciseness with which the United States sought to define its boundary with Canada , it is surprising that a similar attitude was not adopted in its dealings with Mexico. In the 1848 Treaty of Guadelupe Hidalgo which provided for the delimitation of the land boundary between the two countries, it was stated that the boundary: "...shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande,..., up the middle of that river,"[38] continuing until it reached the boundary of the State of New Mexico. The 1853 Gadsden Treaty provided for the offshore boundary to be determined in exactly the same manner.[39]

It is curious that this offshore boundary was not defined in more precise terms, and by the wording of the treaties it seems that the boundary was contemplated to run in a straight line from three leagues off the coast to a point in the middle of the mouth of the Rio Grande River, from where it continued up the river. The simple terms in which the boundary is defined could be justified due to there being no major islands immediately offshore through which the line would have to be traced, unlike the case in Passamaquoddy Bay and the waters between Vancouver Island and the United States.

The 1848 Treaty also provided for the land boundary at the terminus point on the Pacific Ocean, to continue: "... distant one marine league due south of the southermost point of the Port of San Diego, according to the plan of the said port, made in the year 1782..."40 This boundary was not delimited in a more precise fashion until 1970.41

(d) The Grisbadarna Arbitration

The case from which the most detail can be learnt about the considerations that an arbitrator should take into account in determining a maritime boundary in the years prior to the more specific rules introduced by the 1958 Law of the Sea Convention is the 1909 Grisbadarna Arbitration between Norway and Sweden.42 The parties agreed by a 1908 Treaty43 to submit their dispute to arbitration at The Hague so as to determine the direction of their maritime boundary as it ran between Norwegian islands and the Swedish mainland into the Grisbadarna fishing bank, which was an area fished by the people of both countries in the much larger Skagerrak. A Treaty had been concluded in 166144 on this matter, and it was the task of the arbitrators to determine whether it had conclusively settled the boundary or whether a further delimitation should take place. In the Arbitral award it was noted that at the time of the 1661 Treaty the median line or thalweg principle were not accepted practice,45 and that for a proper determination to be made of the current dispute: "...the delimitation should be made to-day by tracing a line perpendicularly to the general direction of the coast, while taking into account the necessity of indicating the boundary in a clear and unmistakable manner,..."[46] The arbitrators then went on to consider that: (1) lobster fishing had been carried on in the area by Swedish fishermen much longer than the Norwegians, (2) that Sweden had performed acts in the area such as the erection of beacons and the measurement of the sea which are consistent with ownership, and (3) that while the Swedish fishermen had for a longer period of time fished the area, the Norwegian fishermen had never been excluded.[47] It was concluded that in all the circumstances it would be perfectly consistent to assign the Grisbadarna banks to Sweden.[48] The arbitrators then provided for a boundary line to pass in a series of straight lines midway between the various reefs that lay offshore the Swedish mainland and the Norwegian islands, and then to proceed midway between the Grisbadarna and the Skjattegrunde fishing banks until it reached the high seas.[49] The importance of the decision in this case is that while the arbitrators did take notice of the conventional technique of delimiting boundaries by way of the mid-line, they also considered the special circumstances of this particular case in that both countries had exploited the fishing banks and that to have awarded complete fishing rights to one country would not have been consistent with the facts.[50] This seems to be the first case in which 'special circumstances' were considered, unlike the decision granting the United States a maritime boundary through Haro Strait and so depriving Great Britain of her previous rights in the waters surrounding San Juan Island.

(e) Other Cases of State Practice

Other instances of State practice prior to the 1930 Hague Conference in which attempts were made to define maritime boundaries are found in the 1919 Treaty of Versailles in which provision was made for an electoral boundary to pass through the median line of the Flensburg Fjord[51], and the 1920 Treaty of Peace between Russia and Finland in which the maritime boundary was to run from the termination of the land boundary: "Across the centre of the bay of Vaida..."[52] This treaty then goes on to define in explicit terms the territorial waters of both countries and gives the co-ordinates where the boundary runs into the Gulf of Finland.[53] Finally mention should be made of a 1928 English Act which brought into effect a 1927 agreement for the delimitation of the waters of Singapore and the Territory of Johore to its north.[54] That agreement provided that the territorial waters of the two countries would run: "...in an imaginary line following the Centre of the deep-water channel in Jahore Strait...",[55] which is the body of water separating Singapore from the Malay Peninsula.

3. THE WORKS OF JURISTS PRIOR TO 1930

Before going on to consider the work completed at the 1930 Hague Conference and the recommendations made prior to that time on the delimitation of maritime boundaries, it is worthy to consider the writings of jurists that appeared during this formative period. Fraser, in an early article on territorial waters, made reference to the problems that occur when a land boundary is extended into the ocean, and after noting the thalweg principle as used in Passamaquoddy Bay, commented that: "It is obvious that a ship at a given time might be within three miles of the coasts of both states. The solution would seem to be that the vessel should be considered in the territorial waters of the state whose coast is nearer."56 He also discussed the problems that arise in the case of straits whose breadth is less than six miles, which at the time was double the accepted three-mile width of territorial waters. He concluded that in the case of such straits, where: "...the opposite shores are occupied by different nations, the principle either of the thalweg or of the ligne mediane would apply, and a vessel would be deemed in the territorial waters of either nation, depending on which side of the thalweg or ligne median it was navigating or was at anchor."57

An author whose work on this matter was more comprehensive and had more of an impact was that of Lapradelle, who wrote in 1928. He described two methods for the delimitation of territorial waters between contiguous states. "(A line) the direction of which will be determined with relation to the land boundary or with relation to the coast line. In the first case, the maritime boundary line will be considered an extension of the land boundary (i.e., the last straight-line section of the land boundary), and will be traced in the same direction. In the second case, the maritime boundary will be considered by itself, independent of the land boundary line, except at its point of contact with the coast. Its direction will be perpendicular to the general direction of the coast line."[58] The first rule proposed by Lapradelle is similar to that used in the extension of the boundary into the Gulf of Mexico by the Treaty of Guadulpe Hidalgo,[59] while the second rule was applied in the Grisbadarna Arbitration.[60]

4. THE 1930 HAGUE CONFERENCE ON THE CODIFICATION OF INTERNATIONAL LAW

(a) Preliminary Discussion

While the 1930 Hague Conference on the Codification of International Law did not result in the passing of a Treaty which dealt with the Law of the Sea, it is valuable to consider the material prepared prior to the Conference and which resulted from the Conference as a guide to what the state of the law was at that time regarding boundary delimitation. Fulton noted that as a result of meetings held by the International Law Association and the Institut de Droit International in the 1890's, rules were proposed with regard to the sovereignty and jurisdiction which could be exercised over Straits. One of those rules provided that: "straits, of which the coasts belong to different states, form part of the territorial sea of the bordering states, which exercise their sovereignty there up to the middle line."[61]

In a series of reports and Draft Conventions prepared by the International Law Association in 1924 and 1926 the 'middle line' was recommended as being the appropriate boundary when a strait with coasts belonging to different countries was less than twice the width of the territorial sea.[62] One of these reports did refer to the problem of territorial waters in a bay claimed by two or more states, but while providing for the middle line to divide the respective claims it did not address the problem of how the land boundary should be extended into the surrounding seas.[63] One group that did consider the above problem was the League of Nations Committee of Experts who noted in a 1926 Report that: "The question is whether we should regard as the limit between the two territorial seas an imaginary line constantly constituting the prolongation of the land frontier between the two States in the same direction towards the sea or if a line should merely be drawn at 90° to constitute a frontier line between the two territorial seas at the point on the coast where the territories of the two States join. In the case of existing States, the matter will be settled by historical considerations. In the event of a political change in the existing frontiers between riparian States it would be advisable to establish special rules in each case having regard to the special geographical circumstances which have led to the fixing of a new frontier. It would be better to arrange for the conclusion of a special agreement between the states concerned, or for the settlement of the matter by arbitration or an ordinary tribunal, than to lay down an immutable principle."64 This report also endorsed the proposal for the middle of the strait to constitute the boundary in the case of a strait shared by two or more countries.65

The 1929 Draft Convention prepared by the Harvard Research in International Law also considered this issue, and in its comment on Draft Article 6 it noted that: "Where the waters within the seaward limit are bordered by two or more states, it would seem that the bordering states should be permitted by international law to divide such waters between them as inland waters. Where agreement cannot be reached, however, it seems necessary to have a rule which would meet the situation presented. The simplest rule would be that suggested in the text, namely, to make no apportionment of these waters as inland waters, but following the sinuosities of the coast to continue the lines marking the limits of the marginal seas of the two states."66

(b) The work of the Conference

In the work of the Preparatory Committee for the Hague Conference the prospective Conference participants were asked to consider what should be the situation with regard to the delimitation of the territorial sea in those cases where the opposite coasts of a strait belong to two or more States. In the various responses that were received it was proposed that the limit of the territorial waters of each State should be: "midway between the two shores"[67], that sovereign rights should extend to the median line,[68] the centre-line,[69] or midway.[70] Of particular note is the response from Denmark, which defined the median line as: "...a line drawn throughout at an equal distance from both coasts",[71] and that of Sweden which noted that the boundary should: "... failing any provision to the contrary in a convention or in the absence of any other special reason, follow the median line."[72]

As a consequence of these replies, a Basis of Discussion was drawn up for consideration at the Conference which provided that: "When two States border on a strait which is not wider than twice the breadth of territorial waters, the territorial waters of each State extend in principle up to a line running down the centre of the strait; if the strait is wider, the breadth of the territorial waters of each State is measured in accordance with the ordinary rule."[73] The consideration at the Conference of this Basis of Discussion was very limited, with participants noting the further problems that would arise in those cases where more than two States bordered the strait, and where the bordering states claimed different breadths of territorial sea.[74] As a consequence, the final report of the Committee noted that: "...it has been thought better not to draw up any rules regarding the drawing of the line of demarcation between the respective territorial seas in straits lying within the territory of more than one coastal State and of a width less than the breadth of the two belts of territorial sea."[75]

This is the only reference in the proceedings at the Hague Conference to the problem of the delimitation of territorial seas between opposite or adjacent states, despite the fact that Fraser and Lapradelle had written on the matter before the Conference as also had the League of Nations Committee of Experts and the Harvard group on research into the International Law of Territorial Waters. Three reasons can be put forward to explain why this was so: (1) the Conference became bogged down over the issue of the limit of territorial waters and consequently did not adequately address other issues, (2) most of the cases which had occurred before this time involved straits and there did seem to be general agreement among the countries at the Hague Conference that in such a case the centre-line should constitute the boundary, (3) with only a three-mile offshore area generally recognized many adjacent states may not have considered it important enough an area to dispute unless fishing rights were at stake. Therefore, while the 1930 Hague Conference did result in a positive indication that the centre or median line was the appropriate line of delimitation in the case of territorial seas between opposite states, it gave no firm indication as to what the law was or what the participating States considered appropriate in the case of the waters washing against adjacent States.

5. STATE PRACTICE FROM 1939 to 1958

With respect to State practice following the Hague Conference, in 1932 Italy and Turkey signed a Convention which provided for the delimitation of their respective maritime boundaries between the coasts of Anatolia and the island of Castellorizo but the agreement gave no indication of what method was used in the delimitation process.[76] In the 1940's, bi-lateral agreements were signed which were indicative of the increasing concern of coastal States to obtain more definite maritime boundaries. Also during this period, with the concept of sovereignty over territorial waters universally recognized, greater interest began to be expressed in the adjacent seabed and continental shelf which lay offshore, this being especially the case with those States who wished to protect their offshore oil fields. A good example is the Gulf of Paria which saw Venezuela and Great Britain sign a Treaty in 1942 providing for the exact definition of the boundary line which represented the respective claims made to submarine areas in the Gulf.

Submarine areas were defined as: "...the sea-bed and sub-soil outside of the territorial waters of the High Contracting Parties."[77] Implementing legislation was also brought into effect in the United Kingdom which specifically defined the new boundary.[78]

(a) The Continental Shelf Declaration by the United States

Mouton, in his work on the development of the continental shelf regime, noted that the Gulf of Paria delimitation was the first instance in which two countries had actually taken a stand regarding the rights of a coastal State over its adjacent continental shelf.[79] But while this event may have been an important step in the development of the law regarding the continental shelf, it is accepted that the 1945 Truman Proclamation was the real catalyst for all future claims to that area. This proclamation provided that: "Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extend to the shore of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the States concerned in accordance with equitable principles."[80]

The importance of the Truman Declaration is that it encouraged other coastal states to make similar claims to their offshore areas and not to limit themselves to the narrow territorial sea zone which it was accepted was legitimate for any State to claim.[81] Anand noted that: "Indeed, the Truman Proclamation triggered a phenomenal change in the law of the sea when several other countries,..., followed the United States in claiming wide jurisdiction in their coastal area for the protection of their natural resources which, in many cases, were not confined to oil or gas and other mineral resources of the continental shelf."[82] The most important of the other expanded claims were those of Argentina who in 1946 declared sovereignty over the epicontinental sea,[83] and that of Chile, when it laid claim in 1947 to a 200 mile zone of sovereignty over the seas adjacent to its coasts.[84] Hence, there is found in these declarations the basis for the future continental shelf regime, which was recognized in the 1958 Convention on the Continental Shelf,[85] and the 200 mile Exclusive Economic Zone, which was recognized in the 1982 Law of the Sea Convention,[86] and consequently the need to more precisely delimit these new maritime boundaries. The other important aspect of the Truman Declaration is that it provided for the delimitation of boundary disputes "in accordance with equitable principles", and though this was only a unilateral declaration it set the standard for future declarations.

Other unilateral declarations made in the 1940's also provided for the delimitation of the boundary by way of equitable principles if the rights of other adjacent States were infringed, such as the Declarations made by Saudi Arabia,[87] Bahrain[88] and Iran.[89] One boundary that was fixed unilaterally without consultation with the opposite State was that between the Falkland Islands and Argentina,[90] but that could be explained due to the tension which existed between those two countries over their respective claims to the Antarctic and the issue of British sovereignty over the Falkland Islands, rather than a desire to make a claim without consulting the neighbouring State. The 1947 Treaty of Peace with Italy also provided for the extension of land boundaries into the adjacent waters; the maritime boundaries to be drawn on lines equidistant from the adjacent coastlines. Such was specifically provided for in the case of the extension of the land boundary out into the Gulf of Panzo which separated Italy and the Free Territory of Trieste,[91] and that which extended into the Porto del Quieto dividing Trieste from Italy.[92]

(b) Practice in the 1950's

In 1953, Australia claimed sovereignty over its continental shelf and in doing so made specific reference to the delimitation of the seabed boundary with Indonesia and Dutch New Guinea by providing that it would be in accordance with the principles of International Law.[93] In 1957, Norway and the U.S.S.R. came to an agreement over the extension of their boundary into the Varangerfjord. This involved the combined problem of a boundary which would run offshore between adjacent States into the Gulf and then between opposite States as the boundary passed through the headlands at the entrance of the Gulf out into the Barents Sea. The agreed boundary provided for the extension of the land boundary at an angle perpendicular to its meeting the coast, then following a median line to a point between Cape Nemetsky and Cape Kibergnes.[94] A similar extension of the land boundary in a direction perpendicular to the shoreline is also found in a 1958 Treaty for the delimitation of the territorial seas of Poland and the Soviet Union into the Gulf of Gdansk.[95] The final delimitation to be noted during this period was that made between Bahrain and Saudi Arabia in 1958[96], which provided for the division of the continental shelf by way of a series of straight-lines which passed through fifteen points on the map, eight of which were noted in the treaty as being at the mid-point of a line between the shores of the two countries.[97]

It can be seen that following the 1945 Truman Declaration the practice of the maritime delimitation of boundaries between opposite and adjacent States grew considerably, no doubt being prompted by the desire for a boundary to give definite expression to each coastal State's respective offshore rights, especially since it was now realized that the continental shelf contained resource riches which could result in considerable wealth to the country which exploited those resources.

6. IMPACT OF BOGGS AND OTHER WRITERS

The writer whose works had the greatest impact on the delimitation of maritime boundaries between opposite and adjacent States was the American Geographer, S. Whittemore Boggs, who accompanied the United States delegation to the 1930 Hague Conference and led that country's submissions on the methods to be used in delimiting the territorial sea.[98] In 1937, Boggs published an article in which he specifically dealt with the maritime boundary problem. He emphasized the need to determine the 'triple point' when dealing with the offshore maritime boundaries of adjacent States, defining that point as being one at which three boundaries should meet: "...namely, the boundary between the territorial seas of the two contiguous countries and, for each of the two countries, the boundary between its territorial sea and the high sea."[99] With respect to the observations made by Lapradelle,[100] he observed that: "The continuation of the last land boundary section is open to the objection that it is usually accidental in direction, having no relation to the necessities of delimiting a water boundary. The second type of line is open to criticism because it is not always possible to determine the general trend of the coast: how much coast should be taken into consideration for this purpose - a distance of three miles on each side of the land boundary, or five miles or twenty miles? And how average the sinuosities so as to ascertain the general trend?"[101]

He also noted that Lapradelle's methods would result in certain waters becoming zones of controvertible jurisdiction because the proposed boundaries would grant those waters to a country whose shore was more than three miles distant while the country whose shore was less than three miles from the zone would be excluded, and concluded that: "It seems clear, therefore, that the normal terminus of the territorial-sea boundary is that point which is three miles from the nearest land of the two sovereignties, and that the simplest boundary through the territorial sea is a straight line. There are, of course, instances in which a simple straight line boundary will not serve, but in such instances it would seem that the boundary should constitute a series of straight lines, the last of which would end at the normal high sea terminus."[102] He also went on to explain what methods were appropriate in the case of a coastline which was dotted with islands, noting that from the 'triple-point' the: "...normal boundary line is one which is equidistant from the islands of the two sovereignties; in other words it is constructed on the chart exactly as the median line in a lake or river is constructed."[103]

Just prior to the commencement of the work of the International Law Commission, Boggs published another article which expanded on his previous work. Here he noted the usefulness of the 'median line', which was described as being: "... the line every point of which is equidistant from the nearest point or points on opposite shores"[104], and was appropriate for use in determining maritime boundaries in the case of lakes, gulfs, and seas. Boggs proposed a method for the delimitation of such a zone between adjacent States based on the equitable principles formula in the Truman Proclamation. He suggested that: "...the lateral jurisdiction limit should be developed progressively from the outer limit of sovereignty, which is the seaward limit of the territorial sea. In this progressive development or extension of the line of lateral jurisdiction, greater and greater stretches of the coasts of the two adjacent states are taken into consideration, thus taking into account all of the sinuosities of the coast, including gulfs and peninsulas, large and small."[105] In advocating the use of the median line in such a case, he suggested that the boundary line beyond the three mile territorial sea would be drawn by using: "...the envelope of the arcs of circles of 6-mile radius from the coasts of the two states, noting carefully the point of intersection of the 3-mile arcs. Then proceed successively to describe the envelopes of arcs of 9-mile, 12-mile, 15-mile radius, etc., until the line is carried out as far as desired. The lateral jurisdiction line thus developed is very sensitive to the vagaries of both states."[106]

Of the others who wrote during this period, Jones emphasized that boundary makers should not only consider geographical factors when delimiting a maritime boundary, The material on page 63 has been removed due to the unavailability of copyright permission. The material included Figure 1, an illustration of a median-line boundary between opposite coasts, and Figure 2 which illustrates a median-line boundary between adjacent coasts. The source of this material was: Pearcy, Geographical Aspects of the Law of the Sea, 49(1959) Annals of the Association of American Geographers, 1 at 17.

but that fishing rights and the interests of native peoples should be considered, plus the historical claims that the adjacent states have asserted over the waters in dispute. He concluded that: "In a particular case, there may be reasons, perhaps territorial or historical, for not wishing to employ a general rule such as Boggs'. There may be a customary line through the marginal sea, an arbitrary line may be adopted, or it may be desirable to extend the last land segment if that cuts the coastline at a fairly large angle."[107] Finally, Mouton, writing in 1954 on the developing regime of the continental shelf, endorsed the approach of the arbitrators in the Grisbadarna Case where they sought to consider the special circumstances of the case and not to arbitrarily deprive one of the parties of their established rights. He suggested that arbitrators who came to decide continental shelf boundaries should be careful not to allow the delimited boundary to cross an oil-pool.[108]

7. CONCLUSION

Upon a review of the boundary delimitations and authorities that have been considered it can be seen that as the importance of offshore areas has grown, so too has the sophistication of the techniques used in determining maritime boundaries. The two cases which involved the United States and Great Britain over their sea boundaries in North America are representative of those times in which fishing and navigation rights were of greater importance than the right to exploit the offshore natural resources. At the 1930 Hague Conference, where the major concern was the breadth of the territorial sea, the only attention given to maritime boundary delimitation was with respect to straits which were bordered by more than one state and whose breadth was less than twice the proposed three-mile territorial sea.

The impact of the writings of Boggs, who was the first to suggest the use of a median line when extending the land boundary between adjacent states into the oceans and to emphasize the equidistance principle, was reflected in those agreements made after 1940 which made use of equitable principles in resolving boundary disputes. The 1945 Truman Declaration regarding continental shelf rights and the following offshore economic zone claims made by Chile and Argentina saw Boggs refine his delimitation technique so that it could be used in the continental shelf, and this was reflected in his 1951 article. Another principle of delimitation developed in the Grisbadarna Arbitration, was that of 'special circumstances' in that the arbitrators made an effort to consider how the boundary's direction would affect the parties before they actually set about the delimitation process. Support for this principle was later found in part of the Swedish submission to the 1930 Hague Conference and the later writings of Jones and Mouton.

It will now be of interest to see how these delimitation techniques, such as the median and equidistance line, and the 'special circumstances' factor, were considered by the International Law Commission during its work in the 1950's.

FOOTNOTES

1 Jones, Boundary-making: A Handbook for Statesmen, Treaty Editors and Boundary Commissioners, 5 (1945)

2 Ibid. p. 57

3 Supra. Chapter 1. n.4

4 Iowa v. Illinois (1893) 147 U.S. 1 at 7 - 8

5 Fulton, The Sovereignty of the Sea, 542 (1911)

6 Ibid. p. 542, quoting from, Le Mirroir des Justices, c.iii

7 Moore, A History of the Foreshore and the Law Relating Thereto, 227 (1888); See: Ibid. Fulton, p. 102, n.1

8 Op Cit. Fulton, p. 99 - 102, referring to Dee, General and Rare Mewmorials pertayning to the Perfect Arte of Navigation (1577)

9 See: Infra. n. 38-55

10 All of these disputes will be considered in detail in Chapter 5

11 La Forest, "Boundary Waters Problems in the East", in, Canada - United States Treaty Relations, ed. Deener, p. 28 - 29 (1963)

12 Article II, The Definitive Treaty of Peace Between Great Britain and the United States, signed at Paris, 3 September 1783, 48 (1783) C.T.S. 487

13 Ibid.

14 Article 4, The Treaty of Peace between Great Britain and the United States, signed at Ghent, 24 December 1814, 63 (1814) C.T.S. 421

15 Islands in the Bay of Fundy: Commission under Article IV of the Treaty of Ghent, in, History and Digest of the International Arbitrations to which the United States has been a Party, ed. Moore, 45-64 (1898). See: Callahan, American Foreign Policy in Canadian Relations, 137 (1967)

16 Article 1, The Convention of Commerce between Great Britain and the United States, signed at London, 20 October 1818, 69 (1818-1819) C.T.S. 293

17 The Fame (1882) No. 4, 634, 8 Federal Cases 984

18 Ibid. p. 985

19 Ibid.

20 The Webster-Ashburton Treaty between Great Britain and the United States, signed at Washington, 9 August 1842, 93 (1842) C.T.S. 415

21 Ibid., Article 1

22 The Oregon Boundary Treaty between Great Britain and the United States signed at Washington, 15 June 1846, 100 (1846) C.T.S. 39

23 See: Classen, Thrust and Counterthrust: The Genesis of the Canada-United States Boundary, Chapter 4 (1965)

24 Ibid. p. 223

25 Ibid. p. 234

26 Article 34, Treaty for the Amicable Settlement of all Causes of Difference between the Two Countries, Great Britain and the United States, signed at Washington, 8 May 1871, 143 (1871-1872) C.T.S. 145

27 The San Juan Water Boundary: Arbitration under Articles XXXIV. - XLII of the Treaty of May 8, 1871, in, Op Cit., Moore, History and Digest of the International Arbitrations to which the United States has been a Party, 196-236

28 Op Cit. Classen, p. 282-283

29 Protocol defining the Boundary Line through the Canal de Haro between Great Britain and the United States, signed at Washington, 10 March 1873, 146 (1873) C.T.S. 35

30 For a discussion of this problem, See: Editorial Comment, Settlement of the Canadian Questions, 2 (1908) A.J.I.L. 630-634

31 See: Article VII, VIII, IX, Treaty relating to Boundary Waters and Boundary Questions between Great Britain and the United States, signed at Washington, 11 January, 1909, 208 (1909) C.T.S.213

32 Op Cit. Callahan, p. 505

33 Boggs, International Boundaries - A Study of Boundary Functions and Problems, 179 (1940), quoting from, International Waterways Commission, Compiled Reports, p. 578

34 See: Editorial Comment, Our Northern Boundary, 2 (1908) A.J.I.L. 634 - 637

35 Article 1, Treaty providing for the more complete definition and demarcation of the International Boundary between the United States and the Dominion of Canada, between Great Britain and the United States, signed at Washington, 11 April 1908, 206 (1907 - 1908) C.T.S. 377

36 Article 1, Treaty relative to the Boundary between Canada and the United States in Passamaquoddy Bay, between Great Britain and the United States, signed at Washington, 21 May 1910, 211 (1910) C.T.S. 152

37 Article 3, Treaty regarding the Demarcation of the Boundary Between the United States and Canada, between Canada and the United States, signed at Washington, 24 February 1925, 43 L.N.T.S. No. 1059, p. 240

38 Article 5, Treaty of Peace, Friendship, Limits and Settlement, between Mexico and the United States, signed at Guadelupe Hidalgo, 2 February 1848, 102 (1847 - 1849) C.T.S. 29

39 Article 1, The Gadsden Treaty, between Mexico and the United States, signed at Mexico City, 30 December 1853, 111 (1853-1854) C.T.S. 235

40 Supra. n.38.

41 Infra. Chapter 5

42 Arbitral award in the question of the delimitation of a certain part of the maritime boundary between Norway and Sweden, 23 October 1909, in, Scott, The Hague Court Reports, 121 (1916); also, 11 U.N.R.I.A.A. 147

43 Convention between Norway and Sweden for the Reference to Arbitration of a Portion of the Sea-Limit in connection with the Grisbader Rocks, signed at Stockholm, 14 March 1908, 206 (1907-1908) C.T.S. 280

44 Convention between Denmark and Sweden, 26 October 1661, 6 (1660-1661) C.T.S. 495

45 Supra. n.42, p. 129

46 Ibid. p. 129

47 Ibid. p. 130-132

48 Ibid. p. 132

49 Ibid. p. 132-133

50 For the modern significance of the decision in this case, See: Collins and Rogoff, The International Law of Maritime Boundary Delimitations, 34 (1982) Maine Law Review 1 at 56-58

51 Article 109, Treaty of Peace between the British Empire, France, Italy, Japan and the United States (the Principal Allied and Associated Powers), and Belgium, Bolivia, Brazil, China, Cuba, Czechoslovakia, Ecuador, Greece, Guatemala, Haiti, the Hedjaz, Honduras, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Romania, the Serb-Croat-Slovane State, Siam, and Uruguay, and Germany, signed at Versailles, 28 June 1919, 225 (1919) C.T.S. 188

52 Article 2(1), Treaty of Peace between Finland and the Soviet Government of Russia, signed at Dorport, 14 October 1920, 3 L.N.T.S., No. 91, p. 5

53 Ibid. Article 3

54 Straits Settlements and Johore Territorial Waters (Agreement) Act 1928, L.R. (Statutes) 1928; 18-19 Geo. V, Ch. 23

55 Ibid. Article 1

56 Fraser, The Extent and Delimitation of Territorial Waters, 11 (1925-1926) The Cornell Law Quarterly, 455 at 477, note 99

57 Ibid. p. 478

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59 Supra. n. 38

60 Supra. n. 46

61 Op Cit. Fulton, p. 692

62 Article 13, Draft Convention submitted by the Neutrality Committee at the 33rd Conference of the International Law Association, in, Brewes, Transactions of the International Law Association 1873 - 1924, 227 (1925); Article 14, Draft Convention-Report of the Neutrality Committee of the International Law Association, 34 (1926) Report of the International Law Association 42-45; Article 3, Draft Convention proposed by the Kakusaiho-Gakkwai in conjunction with the Japanese branch of the International Law Association, July 1926, in, Nationality, Responsibility of States, Territorial Waters: Drafts of Conventions Prepared in Anticipation of the First Conference on the Codification of International Law, The Hague, 1930, Appendix 7, p. 376 (1929)

63 Op Cit. Article 2, Draft Convention proposed by the Kakusaiho - Gakkwai in conjunction with the Japanese branch of the International Law Association

64 Schucking, Memorandum in a Report of the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law on Territorial Waters, 20 Special Number (1962) A.J.I.L. Supp. 87-88

65 Ibid. p. 88 - 89

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69 Ibid. Roumania - p. 276

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76 Convention for the Delimitation of the Territorial Waters between the Coasts of Anatolia and the Island of Castellorizo, between Italy and Turkey, signed at Anakara, 4 January 1932, 138 (1933) L.N.T.S. No. 3191, p. 244

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79 Mouton, The Continental Shelf, 1954-I Recueil des Cours, 343 at 368

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89 Mouton, The Continental Shelf, 10 (1952)

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92 Ibid. Article 22

93 s.3(b) Pearl Fisheries Act Amendment Act 1953, No. 4 of 1953, Commonwealth Acts (Australia) 1953

94 Article 1, Agreement concerning the sea frontier between Norway and the U.S.S.R. in the Varangerfjord, signed at Oslo, 15 February 1957, 312 (1957) U.N.T.S., No. 4523

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98 See: Boggs, Delimitation of the Territorial Sea: The method of delimitation proposed by the delegation of the United States at the Hague Conference for the codification of international law, 24 (1930) A.J.I.L. 541-555

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100 Supra. n 58

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102 Ibid. p. 455

103 Ibid. p. 456. See: Op Cit. Boggs, International Boundaries - A Study of Boundary Functions and Problems, 138-192

104 Boggs, Delimitation of Seaward Areas Under National Jurisdiction, 45 (1951) A.J.I.L. 240 at 256- 258; see: Figure 1 and Figure 2 for examples of a median-equidistance line drawn between opposite and adjacent states

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CHAPTER 3

"THE WORK OF THE INTERNATIONAL LAW COMMISSION AND THE DEVELOPMENT OF THE DRAFT ARTICLES ON THE LAW OF THE SEA"

1. INTRODUCTION: THE EARLY YEARS OF THE INTERNATIONAL LAW COMMISSION

Soon after the establishment of the United Nations in 1945, consideration was given to the formation of a body which would work towards the codification of certain areas of international law, and subsequently in 1947 the General Assembly Committee on the Progressive Development of International law and its Codification recommended the estabishment of an international law commission.[1] In November of that year the General Assembly adopted Resolution 174 (II) establishing the International Law Commission, and after the election of members in 1948, the Commission held its first session in 1949.[2] During that first session it was decided by the Commission to include on the list of topics to be codified the Regime of the High Seas, which included a reference to the continental shelf, and also the Regime of Territorial Waters.[3] Subsequently the topic of the High Seas was given priority by the Commission in its annual report, with Mr. J.P.A. Francois elected as Rapporteur.[4]

At the Second Session in 1950, the Commission had submitted before it the First Report of the Special Rapporteur on the Regime of the High Seas,[5] and also replies from ten Governments to a questionnaire from the Commission as to which topics should be considered for codification on the regime of the High Seas.[6] During the meetings of the Commission that year, the members reviewed a series of questions that the Rapporteur had put forward as being suitable to submit to Governments so as to obtain an indication of current State practice. One of those questions, which dealt with the continental shelf was to the effect that: "Where the continental shelves - or contiguous zones as the case may be - of the different States overlap, how should they be delimited?"[7] In the debate that followed on whether this question was suitable for inclusion in the questionnaire, Mr. el-Khoury noted that: "...as a general rule, when two States were separated by waters, the frontier was in the middle of those waters. When continental shelves overlapped, they should be divided."[8] But some of the other members disagreed, with Mr. Hudson arguing that while the thalweg constituted the boundary in the case of international rivers, no such principle existed with respect to the continental shelf and that the only equitable method of delimitation was by agreement between the individual States.[9] The Commission concluded that, since no known methods existed for the delimitation of the continental shelf when it overlapped between different States, the question would be omitted and considered at a later date.[10]

2. THE THIRD SESSION AND THE EQUITABLE DIVISION OF BOUNDARIES.

The 1951 session saw a further report submitted by the Special Rapporteur[11], and this was thoroughly considered by the Commission during the meetings that year. In introducing his report, Mr. Francois made mention of the impact of the 1951 Boggs article in 'The Geographical Review'[12] and how he had consequently become aware of new ideas through his reading of that article.[13] The Draft Articles prepared by the Rapporteur on the Continental Shelf provided in Article 9 that the delimitation of a continental shelf which is contiguous to two or more States is to be fixed by agreement between the States, failing which the median line between the two States would constitute the boundary.[14]

This Draft subsequently came under consideration at the 115th Meeting of the Commission where the debate centered on the issue of whether the article should provide only that delimitation take place after agreement between the countries involved, or whether it should also refer to actual methods of delimitation as a guideline to the relevant States, and if so, what those methods should be. While some members stressed the success of individual agreements and arbitration by referring to the agreement between the United States and Mexico[15] over their maritime boundary, and also the Grisbadarna Arbitration between Sweden and Norway,[16] others did consider specific delimitation techniques. While some noted that the continental shelf boundary between adjacent States could be provided for by the extension of the limit of the territorial waters boundary line,[17] Mr. Hudson noted that generally this problem had received little attention : "The problem had been tackled mainly bygeographers. The general tendency was to fix the limits by drawing a line perpendicular to the general coastline. There was no international law text which required States to accept a line constituting a prolongation of the line of demarcation of territorial waters. In any case, no such line existed either in law or in fact."[18]

One of the first members of the Commission to talk of the need to provide definite guidelines for delimitation of the boundary on an equitable basis was Mr. Hsu. He noted that: "...the question was whether it was equitable to extend seawards the dividing-line between the territorial waters, since that line would vary according to the configuation of the coast. It was a problem which the Commission must deal with, for if it were left to the interested parties to determine the boundary-line of continental shelves, injustice would probably be done to the weaker States, and the stronger State would take the lion's share. Either the Commission could state that the continental shelf should be partitioned on an equitable basis, or it could go further and lay down precise rules."[19] The Commission decided to reject the principle of delimitation laid down in Draft Article 9,[20] but did conclude that, in the event of the opposite or adjacent

States not reaching agreement on delimitation, recourse to arbitration should be provided for.[21] An amendment was proposed to the Draft Article,[22] which was adopted by the Commission,[23] and consequently Article 9 of the Draft read as follows: "Two or more States, to whose territories the same continental shelf is contiguous, should establish boundaries in the area of the continental shelf by agreement, or failing agreement by compulsory arbitration."[24]

In its report to the General Assembly of that year, an annex to the report contained Draft Articles on the Continental Shelf and Related Subjects, of which Article 7 reproduced Draft Article 9 as discussed above. In the commentary to that Article, after first noting the need for some agreement between the parties, the comment continued: "It is not feasible to lay down any general rule which States should follow; and it is not unlikely that difficulties may arise. For example, no boundary may have been fixed between the respective territorial waters of the interested States, and no general rule exists for such boundaries."[25]

3. THE FOURTH SESSION AND THE REGIME OF THE TERRITORIAL SEA.

The Fourth Session of the Commission in 1952 saw the Special Rapporteur, Mr. Francois submit his first report on the Regime of the Territorial Sea.[26] In the draft articles on the territorial sea which were included in the report, Article 13 provided that: "The territorial sea of the two adjacent States is normally delimited by a line every point of which is equidistant from the nearest point on the coastline of the two States."[27] At the 171st Meeting of the Commission, at which this Draft Article was considered, Francois drew attention to those delimitation techniques which provided that the land boundary be continued in a straight line into the ocean, or that the sea boundary be drawn perpendicular to the coast. He noted that: "Those solutions would give the same line of delimitation in the theoretical case where the frontier was at right angles to the coast and the coast-line was abolutely straight. If the frontier was at 45 degrees to the coast-line, prolongation of the land frontier would be grossly unfair to one of the two States; if the coast-line was indented, it would be illogical to draw a line perpendicular to the coast at the point where the frontier reached the sea. Use of a median line appeared to be the only fair and logical solution in such cases..."[28] He then went on to refer to the Boggs definition of the median line.[29]

While the median line concept was found to be acceptable in the straightforward cases of delimitation, some members noted that it would not be suitable in all cases. Hudson referred to the problems that would arise where islands lay offshore and doubted if any general principle could be applied in such a case.[30] The Chairman of the Meeting, Mr. Alfaro, noted that three kinds of delimitation could occur: "In the first kind, where the frontier ended on a concave indentation of the coastline, there was no difficulty about applying the rule of the median line... Secondly, the frontier could end on a convex indentation of the coast-line; in such cases the rule of the median line appeared to be meaningless, whereas it seemed to be perfectly satisfactory to draw a line perpendicular to the coast at the point at which the frontier reached the sea. Thirdly, it might be necessary to draw the line of delimitation through a river or a bay; in such cases the principle of the median line or the principle of the 'thalweg' could be applied as local conditions determined."[31] It was eventually decided that this topic could not adequately be dealt with at that time and that the Commission needed expert advice as to what delimitation techniques should be adopted. The Rapporteur was instructed to consult with experts on the issue and report back to the next Session of the Commission.[32] The Commission also decided to request information from States regarding their practice on this matter and to accept any submissions they wished to make.[33]

4. THE IMPACT OF THE 1953 REPORT BY THE COMMITTEE OF EXPERTS

The Commission was unable at its Fifth Session in 1953 to give consideration to the topic of the regime of the territorial seas, but two important reports were submitted which did relate to the problems discussed at the previous Session. A Committee of Experts had met at The Hague in April 1953 and drawn up a report on various questions submitted to them.[34] In response to a question that dealt with the boundaries of opposite states which were separated by a distance less than twice the breadth of the territorial sea, it was recommended that as a general rule the boundary was to be the median line: "...every point of which is equidistant from the base-lines of the States concerned."[35] Where islands lay between the two opposite shores, it was noted that: "Unless otherwise agreed upon between the adjacent States, all islands should be taken into consideration in drawing the median line. Likewise, drying rocks and shoals within T miles of only one State should be taken into account, but similar elevations of undetermined sovereignty, that are within T miles of both States, should be disregarded in laying down the median line. There may, however, be special reasons, such as navigation and fishing rights, which may divert the boundary from the median line."[36]

In the case of an adjacent coastline, the Committee of Experts advocated that the line be drawn from the respective coastlines using the principle of equidistance, and that in those instances in which an equitable solution would not be reached by that method, then the boundary was to be determined by negotiation.[37]

Finally, it was noted that techniques used in the delimitation of the territorial sea between opposite and adjacent States were also applicable in the case of the delimitation of the continental shelf.[38] The second report of importance which was submitted in 1953 was that which covered the replies of the various governments concerning the question of the delimitation of the territorial sea between two adjacent States.[39] Unfortunately none of these comments gave any great insight into the techniques which should be used for delimitation.

The Committee began consideration in the Fifth Session of a revised draft on the Continental Shelf presented by the Special Rapporteur, in which the provisions dealing with delimitation had been altered to accommodate the findings of the Committee of Experts, so that it provided for the use of a median line in the case of a continental shelf between opposite states, and an equidistant line between adjacent states.[40] This revised draft also provided for a dispute settlement procedure in Paragraph 3, in which case the matter was to be submitted to arbitration.[41] Noting how he had incorporated the views of the Committee of Experts on the territorial sea into an article dealing with the continental shelf, the Rapporteur justified this by arguing that the report: "... had expressly stated that those rules were equally applicable to the delimitation of the continental shelf, and had confirmed the Commission's preliminary view that the technique of the median line could be adopted for States whose coasts faced each other, at the same time indicating how the line was to be drawn. The experts had agreed that the rules might give rise to doubts in certain specific cases but had recognized that it would be impossible to devise a universally applicable method."[42]

At the beginning of the 204th Meeting which devoted itself fully to a consideration of Draft Article 7, Mr. Pal proposed a text for Article 7 which basically followed the techniques outlined in the Francois text but also made provision for the drawing of the median or equidistant line from the outer lines or limits of the territorial seas.[43] Yet as Francois and others noted,[44] the inherent difficulty in this formula was the lack of unanimity among the coastal states as to the breadth of their territorial seas: "The consequence would therefore be that, by staking a claim for a wider territorial sea, a State would be able to secure a larger extent of the continental shelf."[45] Francois also commented on the suggestion by the Committee of Experts that in some cases special circumstances had to be considered. While arguing that fishing and navigation rights were not matters which could affect a continental shelf delimitation,[46] he did note that: "There were cases, however, where a departure from the general rule was necessary in fixing boundaries across the continental shelf; for example, where a small island opposite one State's coast belonged to another; the continental shelf surrounding the island must also belong to the second state. A general rule was necessary, but it was also necessary to provide for exceptions to it."[47] The Francois Draft was subsequently accepted at the 105th Meeting.[48]

In Draft Article 7 on the Continental Shelf, which was presented in the 1953 Report of the Commission to the General Assembly, it provided that:

1. Where the same continental shelf is contiguous to the territories of two or more States whose coasts are opposite to each other, the boundary of the continental shelf appertaining to such States is, in the absence of agreement between those States or unless another boundary line is justified by special circumstances, the median line every point of which is equidistant from the base lines from which the width of the territorial sea of each country is measured.
2. Where the same continental shelf is contiguous to the territories of two adjacent States, the boundary of the continental shelf appertaining to such States is, in the absence of agreement between those States or unless another boundary line is justified by special circumstances, determined by application of the principle of equidistance from the base lines from which the width of the territorial sea of each of the two countries is measured.[49]

The commentary which followed the draft article, while referring to the impact of the Report of the Committee of Experts upon the final draft, also discussed 'special circumstances', noting that: "As in the case of the boundaries of coastal waters, provision must be made for departures necessitated by any exceptional configuration of the coast, as well as the presence of islands or of navigable channels. To that extent the rule adopted partakes of some elasticity".[50] The arbitration paragraph of Draft Article 7 had now become a separate article of its own, which was a general arbitration clause for all of the articles on the continental shelf.[51]

5. THE SESSIONS LEADING UP TO THE FINAL DRAFT

In 1954 the Commission gave further consideration to the regime of the territorial sea, having before it a further report of the Rapporteur.[52] Article 16 of the Rapporteur's draft, which dealt with the delimitation of the territorial sea between opposite States, incorporated all the recommendations of the Committee of Experts, with the median line the suggested method of drawing the boundary, with account to be taken of islands, drying rocks and shoals.[53] Paragraph 2 provided that: "Exceptional considerations of navigation and fishing rights may justify a different delimitation of the boundary, in such manner as the parties concerned may agree."[54] Article 17 dealt with delimitation between adjacent States and provided that the boundary was to be drawn on the basis of equidistance from the coastlines.[55]

When introducing these draft articles for consideration before the Commission, Francois noted that with respect to Article 16 he had included the reference to islands because: "It was indeed normal, when drawing the median line of demarcation of the territorial sea, to take into account islands situated between the two States, unless there was an agreement between those States, when, for example, the island in question was farther away from the State to which it belonged than from the other State."[56] At the conclusion of the debate on Article 16, it was proposed that the article be re-drafted along the lines of Article 7 on the Continental Shelf, many members of the Commission fearing that a great deal of confusion could result if different techniques were used to delimit the territorial sea and the Continental Shelf.[57] This proposal was adopted.[58] A similar approach was taken with Article 17,[59]

In the report by the Commission to the General Assembly in 1954, the provisional articles on the regime of the territorial sea were published, in which Articles 16 and 17 as considered in the meeting of the Commission had now become Articles 15 and 16. Article 15 provided that: "The boundary of the territorial sea between two States the coasts of which are opposite each other at a distance of less than twice the breadth of the territorial sea is, in the absence of agreement of those States, or unless another boundary line is justified by special circumstances, the median line every point of which is equidistant from the base lines from which the width of the territorial sea of each country is measured."[60] In the comments which followed this Article it was noted that the Commission had been influenced by the Report of the Committee of Experts, and the precedent it had set with Article 7 of the Draft provisions on the Continental Shelf.[61]

The eventual Draft Article dealing with the territorial sea between adjacent States provided that: "The boundary of the territorial sea between adjacent States is drawn, in the absence of agreement between those States or unless another boundary line is justified by special circumstances, by application of the principle of equidistance from the base lines from which the width of the territorial sea of each of the two countries is measured."[62] The comment on the Article noted the various methods that had been proposed previously with respect to the drawing of the boundary line in the case of adjacent States, but that the equidistance line had been accepted because of its applicability to different types of coastlines. "Where the coast is straight, a line drawn according to this method will coincide with one drawn at right angles to the coast at the intersection of the land frontier and the coastline. If, however, the coast is curved or irregular, the line takes the contour into account while avoiding the difficulties of the problem of the general direction of the coast."[63]

It can be seen, even at this early stage of the Commission's work, that between 1951 and 1954, the influence of the median line and the equidistance principle was very strong and that following the 1953 Report by the Committee of Experts the Commission began to give greater emphasis to these methods of delimitation.

At the 1955 Session of the Commission the members had before them eighteen comments by Governments on the provisional articles concerning the territorial sea which had been adopted at the previous session.[64] Five countries made explicit reference to Draft Articles 15 and 16, and of those the Belgian comment was the most substantive. Their reply contained an alternative text for Article 16 noting that the Commission's Draft Article did not allow for the case where special circumstances necessitated the drawing of a boundary line other than one based on the equidistance principle, and that it also failed to make clear whether arbitration was compulsory in the case of a dispute. The alternative Belgian text provided that: (i) the boundary of the territorial sea between two adjacent

States was to be drawn on the basis of the equidistance principle, (ii) that if a boundary had already been agreed upon by the adjacent States, it was to remain in effect, and (iii) that in the absence of agreement, and if a boundary other than one drawn on the equidistance principle was justified by special circumstances, then the boundary should be drawn by agreement.[65] Yet the Belgian Government accepted that both their proposal and the Commission's Draft: "...leaves unsettled what is meant by the expression 'special circumstances.' Does it mean circumstances in which, owing to the configuration of the coasts, it would be impossible or difficult to apply the principles of equidistance? Or would the expression 'special circumstances' also cover the case where a country invokes historical arguments?"[66]

The Commission in 1955 considered the Rapporteur's report on the High Seas, which had been held over from the previous year,[67] and also a series of proposed amendments by the Rapporteur on the territorial sea.[68] The debate on the High Seas did not cover the Chapter dealing with the Continental Shelf, that having been settled in the 1953 Session, but debate did focus on Draft Articles 14 and 15 of the Territorial Sea. The Belgian proposal for an amended Article 16 was rejected by the Rapporteur,[69] but Francois did propose the addition of a second paragraph to both articles as a consequence of the suggestions made by the Governments of the Netherlands, Sweden and the United Kingdom.[70] Both of these proposals were accepted,[71] and so apart from some other minor adjustments, both Articles 14 and 15 appeared in the Commission's 1955 Draft on the Territorial Sea in identical form to that of the previous year, except for the addition of paragraph 2 to each Article, which provided: "Lines shall be marked on the largest-scale charts available which are officially recognized."[72]

6. FINAL REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE REGIME OF THE HIGH SEAS AND THE TERRITORIAL SEA.

During the Eighth Session of the Commission in 1956, the final year of its consideration of the topic of the High Seas and the Territorial Sea, it had various reports by the Special Rapporteur and replies from Governments on both topics to consider. The final report of the Rapporteur did not refer to the Articles which are the concern of this paper,[73] but of importance were the comments by Governments on the Draft Articles on the Territorial Sea adopted at the 1955 Session.[74]

The Government of Norway again referred to the problems that could occur in the delimitation of the territorial sea if the two States concerned claimed a territorial sea of different breadths. They pointed out this difficulty by noting: "Thus, if in the case of two opposing coasts one State claims six miles and the other three miles, and the total distance between the opposing coasts is eight miles, the breadth of the territorial sea of each State in the area concerned would be four miles under the proposed rule. One of the States would consequently get a broader territorial belt than it actually claims."[75] It was also noted that similar problems would arise in the case of adjacent States if the angle between their coasts where the land boundary met was less than 180°, especially if the coastline was at the inland point of a bay.[76]

The United Kingdom also made comments with respect to Draft Article 14, noting that in many cases it was not possible to apply an exact median line between opposite States.[77] Consequently it was noted that: "In the experience of the United Kingdom Government, the most satisfactory course will usually be to apply the principle of the median line: that is, an approximate or simplified median line based as closely as circumstances allow on an exact median line and drawn on a specific chart of specific date."[78] An alternative to paragraph 1 of Article 14 was consequently submitted which provided for this amendment.[79] A similar comment was made by the United Kingdom as regards Draft Article 7 on the Continental Shelf, and an amendment similar to that made to Article 14 was also proposed.[80] The Rapporteur acknowledged the Norwegian comment that the problem of two States claiming different breadths of territorial sea had yet to be solved,[81] and also agreed with the United Kingdom proposal on Draft Article 14 of the Territorial Sea, subject to drafting amendments.[82]

At the 360th Meeting of the Commission, Draft Article 7 on the Continental Shelf was considered, in which the proposed amendment by the United Kingdom was discussed. In the debate, Sir Gerald Fitzmaurice noted that the amendment would have the effect of making special circumstances the rule rather than the exception.[83] Without actually voting on whether to accept the alteration proposed by the United Kingdom, the debate closed by sending the Article to the Drafting Committee for consideration.[84] No further substantial debate took place on Draft Article 7 during the meetings of the Commission that year, and consequently the final form of Article 7, which became Article 72 of the Commission's Draft Articles on the Law of the Sea was very similar to that adopted in 1953.[85]

In the commentary on Article 72 the Commission noted that similar principles had been used to those employed in the delimitation of the territorial sea between opposite and adjacent States. Mention was also made that: "As in the case of the boundaries of the territorial sea, provision must be made for departures necessitated by any exceptional configuration of the coast, as well as the presence of islands or of navigable channels. This case may arise fairly often, so that the rule adopted is fairly elastic."[86]

At the opening of the debate on Article 14 of the Territorial Sea regime, Mr. Francois noted that he had proposed an amended Article which combined Articles 12 and 14,[87] and had also taken into account the various replies of Governments and suggested additions to Article 14.[88] With respect to the question of what was to be the case where the opposite States claimed different breadths of territorial sea, he noted that: "There might be a solution when those claims were recognized by international law, or, in other words, were regarded as historic rights, but there seemed to be no solution where the breadth of the territorial sea was disputed."[89] The Commission adopted the proposed draft of the Rapporteur and referred it to the Drafting Committee.[90] With respect to Article 15, the basic text was adopted subject to an amendment proposed by Mr. Zourek[91] that the first paragraph incorporate similar features to that proposed for the delimitation of the continental shelf. This article was also sent to the Drafting Committee for its consideration.[92]

The final Draft Article on the delimitation of the Territorial Sea in straits and between opposite coasts was Article 12, which provided that:

1. The Boundary of the territorial sea between two States, the coasts of which are opposite each other at a distance of less than the extent of the belts of territorial sea adjacent to the two coasts, shall be fixed by agreement between those States. Failing such agreement and unless another boundary line is justified by special circumstances, the boundary is the median line every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of the two States are measured.
2. If the distance between the two States exceeds the extent of the two belts of territorial sea, the waters lying between the two belts shall form part of the high seas. Nevertheless, if, as a consequence of this delimitation, an area of the sea not more than two miles in breadth should be entirely enclosed within the territorial sea, that area may, by agreement between the coastal States, be deemed to be part of the territorial sea.
3. The first sentence of the preceding paragraph shall be applicable to cases where both coasts belong to one and the same coastal State. If, as a consequence of this delimitation, an area of the sea not more than two miles

in breadth should be entirely enclosed within the territorial sea, that area may be declared by the coastal State to form part of its territorial sea.

4. The line of demarcation shall be marked on the officially recognized large-scale charts.[93]

As can be seen, the paragraph which is of main interest is paragraph 1, of which it was noted in the comment on the Article that the report of the Committee of Experts in 1953 had the greatest impact on how the article was eventually framed.[94] The Commission noted that: "It considered, however, that it would be wrong to go into too much detail and that the rule should be fairly flexible. Consequently, it did not adopt certain points of detail laid down by the experts. Although the Commission noted that special circumstances would probably necessitate frequent departures from the mathematical median line, it thought it advisable to adopt, as a general rule, the system of the median line as a basis for delimitation."[95]

The draft article dealing with the delimitation of the territorial sea between adjacent States was Article 14, which provided:

1. The boundary of the territorial sea between two adjacent States shall be determined by agreement between them. In the absence of such agreement, and unless another boundary line is justified by special circumstances, the boundary is drawn by application of the principle of equidistance from the nearest points on the baseline

from which the breadth of the territorial sea of each country is measured.

2. The boundary line shall be marked on the officially recognized large scale-scale charts.[96]

This Draft Article is substantially the same as that adopted in 1955 with some minor drafting changes. The commentary following the Article was also similar to that which accompanied Article 16 in the 1954 Report.[97]

With the Commission having completed its work on the Law of the Sea in 1956, it recommended that: "...the General Assembly should summon an international conference of plenipotentiaries to examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate."[98] This recommendation was consequently accepted by the United Nations and the Commission's Draft Articles were the basis for consideration at the 1958 United Nations Conference on the Law of the Sea.

7. APPRAISAL OF THE DRAFT ARTICLES

From this review it can be concluded that the International Law Commission did produce in the seven years that it fully considered the topic of the Territorial Sea and the Continental Shelf a remarkable set of provisions, which laid the foundation for all future considerations of the topic of the delimitation of maritime boundaries between opposite and adjacent States until the 1982 Law of the Sea Convention. The biggest impetus for the development of the Draft Articles by the Commission was the 1953 Report of the Committee of Experts, of which the members included, S. Whittemore Boggs, whose writings were considered in Chapter 2, and Commander R. H. Kennedy, who was a delegate to the 1958 Law of the Sea Conference.

Once Draft Article 7 on the Continental Self was formulated in 1953, after the Report of the Committee of Experts, it retained its form to become Article 72 in the final 1956 Draft of the Commission. The articles dealing with the territorial sea had much more of an unsettled life due to the divergence of opinion over whether special circumstances should be considered, the importance to be given to islands that lay immediately offshore, and also the associated problem of no definite territorial sea limit being agreed upon. As such the rewriting of those Articles continued until the 1956 Session, at which time what had been Article 14 in the 1955 Draft was incorporated with another Article to eventually become Article 12, in which paragraphs two and three referred to the problems posed by small enclaves of high sea which remained between the territorial sea of opposite states. Article 14, which dealt with the territorial sea between adjacent States, took a form similar to that of Article 72, with the equidistance principle the recommended principle of delimitation in the absence of agreement or special circumstances.

McDougal and Burke gave full consideration to the work of the International Law Commission in their 1962 work on "The Public Order of the Oceans,"[99] even though the Commission's Draft Articles had by then been replaced by the provisions of the 1958 Law of the Sea Conventions.[100] With respect to Draft Articles 12 and 14 on the territorial sea, emphasis was placed on how the second sentence of Article 14 appeared to frustrate the use of the equidistance technique by: "...declaring that only when one party drops insistence on special circumstances are both parties required to use a line of equidistance. This seems to contemplate, therefore, that one party can continue to insist upon its view of special circumstances and thereby frustrate a resolution of the disagreement by application of the principle of equidistance."[101] It was concluded that this sentence was intended to be a guide to a third-party decision-maker on how the principle of equidistance could be applied.[102] This conclusion though is not consistent with the debates of the Commission, as at no time was it the intention of the Commission to provide a series of guidelines for an arbitrator. A similar concern was raised with respect to the wording of Draft Article 12.[103]

Their comments on Article 72 were similar to those made regarding the previous Article,[104] but it should be noted that in this case the Commission did provide for a method of dispute settlement for those Articles dealing with the Continental Shelf[105] and McDougal and Burke are consequently justified in arguing that the special circumstance and equidistance principle were included as guidelines for any future arbitration on the subject.[106] Their interpretation of Article 72 was that: "...if states were unable to agree on a boundary and if another boundary was not justified by special circumstances as determined by adjudication in the International Court of Justice, then the median line and principle of equidistance are to apply, respectively, to opposite and adjacent states. The decision maker is thus directed to provide for a boundary following the principle of equidistance if special circumstances are not shown."[107]

It will now be of interest to see what response these Draft Articles received at the 1958 United Nations Conference on the Law of the Sea, and how they were transformed into codified Articles in the Conventions which resulted from the Conference.

FOOTNOTES

1 *See:* Official Records of the General Assembly, Second Session, Sixth Committee, Annex 1

2 *See:* *The Work of the International Law Commission*, 3rd Ed., 4 - 5 (1980)

3 U.N. Doc. No. A/CN. 4/SR. 5, p. 43

4 U.N. Doc. No. A/CN. 4/13, p. 19 -21

5 U.N. Doc. No. A/CN. 4/17

6 U.N. Doc. No. A/CN. 4/19

7 U.N. Doc. No. A/CN. 4/SR. 69, p. 38

8 Ibid. p. 41

9 Ibid. p. 42

10 Ibid. p. 56

11 U.N. Doc. No. A/CN. 4/42

12 Boggs, National Claims in Adjacent Seas, 41(1951) *The Geographical Review*, 185 - 209

13 U.N. Doc. No. A/CN. 4/SR. 113, p. 24

14 U.N. Doc. No. A/CN. 4/42, p. 162

15 U.N. Doc. No. A/CN. 4/SR. 115, p. 128 per Mr. Cordova; and; *See:* for a discussion of the United States - Mexican maritime boundary, Chapter 2, n. 38 - 41

16 Ibid. p. 104 per Mr. Sundstrom; and; *See*: for a discussion of the Grisbadarna Arbitrtion; Chapter 2, n. 42 - 50

17 Ibid. p. 105 per Mr. Sundstrom, p. 109 per Mr. Spiropoulos

18 Ibid. p. 122

19 U.N. Doc. No. A/CN. 4/SR. 116, p. 4

20 Ibid. p. 38. *See:* Supra n. 14

21 Ibid. p. 48

22 Ibid. p. 91 per Mr. el Khoury

23 Ibid. p. 101

24 Ibid. p. 100

25 U.N. Doc. No. A/1858, Annex, Article 7, p. 1

26 U.N. Doc. No. A/CN. 4/53 Francois was elected Special Rapporteur for the Territorial Sea in 1950, See: U.N. Doc. No. A/1316, p. 18.

27 Yearbook of the International Law Commission. 1952 Vol. 1, 180, note 1 (1958)

28 U.N. Doc. No. A/CN. 4/SR. 171, p. 2.

29 Ibid. See: Boggs, Delimitation of Seaward Areas under National Jurisdiction, 45 (1951) A.J.I.L. 240 at 256

30 Ibid. p. 7

31 Ibid. p. 17

32 Ibid. p. 52, 63

33 U.N. Doc. No. A/CN 4/SR. 172, p. 2 - 13

34 U.N. Doc. No. A/CN 4/61/Add 1. Annex

35 Whiteman, Conference on the Law of the Sea: Convention on the Continental Shelf, 52(1958) A.J.I.L. 629 at 649, Note 131, quoting from, English translation of U.N. Doc. No. A/CN 4/61/Add 1. Annex

36 Ibid. Note: 'T miles' refers to the breadth of the territorial sea, a limit which at that time had not been decided upon by the Commission.

37 Ibid.

38 Ibid. p. 650

39 U.N. Doc. No. A/CN 4/71 and Add. 1 - 2

40 U.N. Doc. No. A/CN 4/SR. 201, p. 37

41 Ibid.

42 Ibid. p. 39

43 U.N. Doc. No. A/CN 4/SR. 204, p. 2

44 Ibid. p. 17 per Mr. Spiropoulos; p. 20 per Mr. Lauterpacht; p. 32 per Mr. Liang.

45 Ibid. p. 5 per Mr. Fracois

46 Ibid. p. 35

47 Ibid. p. 37

48 U.N. Doc. No. A/CN 4/SR. 205, p. 47

49 U.N. Doc. No. A/2456, Chapter III, Part II - Article 7

50 Ibid. p. 82

51 Ibid. Chapter III, Part II - Article 8.

52 U.N. Doc. No. A/CN 4/77.

53 Ibid. Article 16, Paragraph 1.

54 Ibid. Article 16, Paragraph 2

55 Ibid. Article 17

56 U.N. Doc. No. A/CN 4/SR. 261, p. 55

57 U.N. Doc. No. A/CN 4/SR. 262, p. 15, 17

58 Ibid. p. 18

59 Ibid. p. 30

60 U.N. Doc. No. A/2693, Chapter IV - II, Article 15

61 Ibid.

62 Ibid. Article 15

63 Ibid.

64 U.N. Doc. No. A/2934. Annex.

65 Ibid. No. 2 - Article 16

66 Ibid.

67 U.N. Doc. No. A/CN 4/79

68 U.N. Doc. No. A/CN 4/93

69 U.N. Doc. No. A/CN 4/SR. 320, p. 18

70 Ibid. p. 17, 18. See: U.N. Doc. No. A/2934: No. 10. Netherlands - Articles 15 and 16, No. 13. Sweden, No. 16. United Kingdom of Great Britain and Northern Ireland - Article 15 and 16

71 Ibid.

72 U.N. Doc. No. A/2934, Chapter III - II, Article 14, 15.

73 U.N. Doc. No. A/CN 4/97

74 U.N. Doc. No. A/CN 4/97 and Add. 1 to 9

75 Ibid. No. 18 - Articles 14 and 15

76 Ibid.

77 Ibid. No. 23 - B, Article 14, p. 2

78 Ibid. p. 3

79 Ibid.

80 Ibid. Continental Shelf and Contiguous Zone, Article 7.

81 U.N. Doc. No. A/CN 4/97. Add. 1 to 3, p. 82 - 83.

82 Ibid. p. 84 - 85

83 U.N. Doc. No. A/CN 4/SR. 360, p. 28.

84 Ibid. p. 52

85 U.N. Doc. No. A/3159. Chapter II, Part II, Article 72

86 Ibid. Chapter II, Part III, Article 72 Commentary, p. 1

87 U.N. Doc. No. A/CN 4/97/Add. 2, p. 88. Article 12 originally dealt with the drawing of a boundary line between States whose coasts were separated by a strait which was less the width of the territorial sea.

88 U.N. Doc. No. A/CN 4/SR. 366, p. 24-32

89 Ibid. p. 37

90 Ibid. p. 46

91 Ibid. p. 55

92 Ibid. p. 56

93 U.N. Doc. No. A/3159, Chapter II, Part II, Section II, Article 12

94 Ibid. Chapter II, Part III-I, Section II, Article 12, p. 2

95 Ibid.

96 Ibid. Chapter II, Part II, Section II, Article 14.

97 Ibid. Chapter II, Part III-I, Section II, Article 14. See: Supra. p. 13

98 Ibid. p. 28

99 McDougal and Burke, The Public Order of the Oceans - A Contemporary International Law of the Sea (1962)

100 See: Chapter IV

101 Op Cit. McDougal and Burke, p. 431

102 Ibid. p. 432

103 Ibid. p. 433

104 Ibid. p. 725 - 728

105 U.N. Doc. No. A/3159, Chapter II, Part II - II, Section III, Article 73

106 Op Cit. McDougal and Burke, p. 727 - 728.

107 Ibid.

CHAPTER 4

"THE 1958 UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA"

1. INTRODUCTION

Following the submission by the International Law Commission of its Eighth Report in 1956 to the United Nations General Assembly,[1] in which it was recommended that an international conference be called to consider the work of the Commission on the Law of the Sea and to attempt to embody the results in a Convention or series of Conventions,[2] the General Assembly requested in February 1957 that the Secretary-General convoke the recommended conference in March 1958.[3] The Conference opened on 24 February 1958,[4] and closed on 17 April, 1958,[5] during which time five separate Committees considered the 73 Draft Articles put forward by the International Law Commission in 1956[6] and also the topic of "free access to the sea of land-locked countries, as established by international practice of treaties."[7]

Under the rules of procedure for the Conference, five committees were established to consider the Territorial Sea and Contiguous Zone, the General Regime of the High Seas, the Fishing regime of the High Seas, the Conservation of Living Resources, the Continental Shelf, and the question of Free Access to the Sea of Land-Locked Countries.[8] The Conference was attended by the representatives of 87 States and 7 Specialized Agencies,[9] and, if achievement is to be measured by the combination of participation and results, it can be argued that it was one of the most successful codifying Conferences on International Law held to that time. This Chapter will deal with the debates in the Committee and Plenary Sessions of the Conference as the articles which dealt with the delimitation of maritime boundaries between opposite and adjacent States were formulated.

2. DRAFT ARTICLE 72 AND THE FOURTH COMMITTEE

(a) Preliminary Comments

Consideration will first be given to the work of the Fourth Committee which dealt with the Continental Shelf regime, due to the fact that the early completion of its work set a precedent which the First Committee later referred to. In the year prior to the convening of the Conference, the United Nations General Assembly requested the Governments invited to the Conference to comment on the Draft Articles which had been submitted by the International Law Commission,[10] and replies were received from 21 Governments,[11] of which both Norway and the Netherlands made detailed comments on Draft Article 72.

The Norwegian Government preferred a simpler delimitation technique than that of the median and equidistance line advocated by the International Law Commission, and advocated a return to the less specific concepts employed by the arbitrators in the Grisbadarna Arbitration.[12] The Netherlands Government by contrast, was in favour of the Draft Article, emphasizing the need for: "...an internationally accepted rule for these delimitations, together with adequate safeguards for impartial adjudication in the case of disputes, as it will not be sufficient simply to express the hope that the States concerned will reach agreement on this matter."[13]

Other comments were made by the representatives of the various delegations in a General Debate on the Draft Articles which took place during the first twelve meetings of the Fourth Committee. The Colombian delegate noted that while his Government favoured the median line concept as provided for in Article 72, the delegation was concerned that the term 'special circumstances' was so vague that it could lead to disagreement,[14] while the delegate representing Venezuela said that his country could not accept the division of the continental shelf down the middle and argued that the best method for determining the boundary was through by-lateral agreements between the States concerned.[15] Finally the delegate from Tunisia noted that it was important that continental shelf delimitations should take account of the geographical configuration of the region and that great flexibility would have to be used in applying the article as it was drafted.[16]

(b) The Committee Debates

The first meeting of the Fourth Committee which saw serious debate of Draft Article 72 was opened by Mr.

Nikolic of Yugoslavia, who spoke on behalf of the Yugoslav amendment, proposing the deletion of the 'special circumstances' criterion from both paragraphs one and two.[17] He argued that the term was legally unacceptable because it was: "...both vague and arbitrary, and likely to give rise to misunderstanding and disagreement. The question was where and how much special circumstances were enumerated in international law and who could be charged with interpreting their application."[18] Amendments were also proposed by the Netherlands,[19] who sought to provide for the case of undersea tunneling from the territories of two adjacent States,[20] and the United Kingdom,[21] whose proposal intended to ensure that the median line was the initial basis for delimitation in all cases.[22]

The subsequent meeting of the Committee was dominated by the opening statement of Mr. Kennedy, who was one of the Group of Experts consulted by the International Law Commission in 1953[23] and now was a member of the United Kingdom delegation. He emphasized that the median line was the fairest method of establishing a sea boundary,[24] and that while 'special circumstances' such as islands or mineral and fishing rights could exist, the median line should still be considered the basis and starting point of all negotiations.[25] He also spoke of the importance of having the delimited boundaries defined with reference to charts as they existed at a particular date so as to ensure that the boundary would remain constant and not fluctuate with changes in the coastline.[26] The United Kingdom amendment on this latter point was supported by the United States[27] and Canada.[28]

The debate which followed was split between those delegates who supported the 'median line' and 'special circumstances' criteria, and those who did not. In response to the United Kingdom amendment, the Italian delegate noted that if the median line technique was given priority: "...it was unlikely that a State which found the median line advantageous to itself would agree to depart from it in the interests of another State. Adequate arrangements which would satisfy the interests of both parties could only be reached by giving due consideration to special circumstances."[29] The Netherlands,[30] the United States[31] and Canada [32] also favoured the retention of the special circumstances criterion. The delegate from Venezuela[33] argued that the median line was not acceptable as a general rule of delimitation, noting that: "The situations that existed in different parts of the world were too varied to justify the adoption of any such general rule. Moreover the cases in which the median line would offer the best solution were likely to arise less frequently than any others, so that exceptions would be more numerous than the cases covered by the general rule"[34] This statement brought a harsh response from Colombia,[35] the Netherlands,[36] and the United States,[37] who all rejected the Venezuelan amendment and reaffirmed their support for the median line method.

(c) The emergence of Article 6

The final meeting of the Committee which considered Draft Article 72 was opened by an announcement from the United Kingdom that it had revised its original amendment to include a reference to 'special circumstances',[38] but after further objections by the delegates from India,[39] France[40] and the Netherlands,[41] the United Kingdom agreed upon a further amendment[42] bringing its proposal very close to that of the Netherlands.

Eventually the amendments proposed by the Netherlands and the United Kingdom were joined,[43] with the deletion of the words 'or other submarine areas' from the two paragraphs of the Netherlands amendment,[44] and the retention of the third paragraph from the United Kingdom proposal.[45] Consequently all of the amendments were put to the vote, with only the joint Netherlands - United Kingdom proposals being accepted.[46]

When the report of the Fourth Committee[47] was presented to the plenary session of the Conference, the only amendment debated was that from Yugoslavia,[48] who again proposed the deletion of the special circumstances criterion.[49] The amendment was defeated and Article 72 as presented was adopted by 63 votes to none, with 2 abstentions.[50]

(d) The Convention on the Continental Shelf.

Draft Article 72 eventually became Article 6 of the Convention on the Continental Shelf.[51] That article provides:

1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circusmtances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.
2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agrement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.
3. In delimiting the boundaries of the continental shelf, any lines which are drawn in accordance with the principles set out in paragraphs 1 and 2 of this article

> should be defined with reference to charts and geographical features as they exist at a particular date, and reference should be made to fixed permanent identifiable points on the land.[52]

The Convention on the Continental Shelf came into effect on 10 June 1964 and as of 31 December 1982 it had 54 contracting parties.[53] Of those 54, 9 made declarations or reservations upon their signature or ratification of the Convention and 6 of those related to Article 6. Not surprisingly, Yugoslavia[54] refused to accept that 'special circumstances' could influence a delimitation, while Venezuela[55] made an express reservation with respect to the whole Article. Other countries indicated how they would interpret the Article's provisions; Iran[56] noting that special circumstances could be applied in determining the boundary from the high-water mark, while Greece[57] stated that it would apply the normal baseline system to measure the breadth of the territorial sea, from which the boundaries of the continental shelf would eventually be measured. China[58] stated that the maritime boundary of two or more opposite or adjacent States was to be measured in accordance with the natural prolongation of the land territory, and also that no account would be taken of exposed rocks and islets. France[59] refused to accept the equidistance principle in three cases, one of these was where special circumstances existed, such as in the case of the Bay of Biscay, the Bay of Granville, and the sea areas of the Straits of Dover and the North Sea off the French coast. This reservation, and the objection to it by the United Kingdom[60] was of significance during the Anglo-French Channel Arbitration, which shall be considered in the next chapter.

3. THE TERRITORIAL SEA AND THE FIRST COMMITTEE

(a) Preliminary Comments

With respect to the pre-Conference comments by Governments on the International Law Commission's Draft Articles 12 and 14 which dealt with the delimitation of the territorial sea between opposite and adjacent States, the most substantive comments came from the Norwegian Government.[61] They noted that Paragraph 1 of Article 12 did not provide a resolution for the situation where opposite States claimed different breadths of territorial sea,[62] a point which had previously been a concern of the Norwegians when this matter was being considered by the International Law Commission.[63] As a consequence of this uncertainty, Norway argued that it was impossible to actually determine the dividing line between the territorial seas of opposite States by a rule of international law, and that the solution was to include: "...a provision to the effect that no State is entitled to extend the boundary of its territorial sea beyond the median line..."[64] Norway proposed that a similar provision be also included in Draft Article 14.[65]

(b) Committee Debates.

When the Draft Articles came to be debated before the First Committee, the sessions were dominated by a proposal from Norway[66] which sought to overcome the problem alluded to in its pre-Conference comments. The main effect of their amendment was to apply the median line where opposite or adjacent States had territorial seas of different breadths and to delete the reference to special circumstances.[67] A Yugoslav amendment,[68] similar to that made in the Fourth Committee debates on Draft Article 72, [69] also proposed the deletion of the special circumstances criterion in both articles, it being noted: "The granting of a right to establish an unspecified boundary line other than the median line would cause confusion and encourage States to claim special circumstances for reasons of self interest."[70]

The subsequent debate centered on whether these amendments were acceptable or not to the delegates. The Yugoslav amendment was supported by a similar amendment by Greece,[71] which in turn was supported by Turkey.[72] The delegate from the United Kingdom, Sir Gerald Fitzmaurice, was prepared to support the Norwegian amendment on some counts,[73] yet he would not agree to a deletion of the 'special circumstances' criterion. He acknowledged that the fact that 'special circumstances' were not defined was a weakness,: "Nevertheless, special circumstances did exist which, for reasons of equity or because of the configuration of a particular coast, might make it difficult to accept the true median line as the actual line of delimitation between two territorial seas."[74] Another amendment which drew some commment at this session was that from the Federal Republic of Germany,[75] who sought to include a reference to historic rights in the text of both Articles 12 and 14. It was argued that: "Such rights had the same legal value as those acquired by an explicit agreement."[76] This was similar to the concept of prescriptive usage contained in the Norwegian amendment.[77]

(c) Acceptance by the Committee of the Draft.

At its next meeting the delegates from Saudi Arabia,[78] the United Kingdom,[79] Ceylon[80] and Italy[81] all came out in strong support of the original drafts and the retention of the special circumstances criterion, it being noted that it would be contrary to a decision of the Conference to delete the reference to special circumstances after the Fourth Committee had already adopted that criterion in Article 72.[82] Sir Gerald Fitzmaurice argued against the Norwegian proposal and urged for its revision, noting that: "...hydrographical experts were agreed that special circumstances of a technical and geographical character frequently arose which made the adoption of a rigid median line very difficult."[83] Though the Norwegian proposal did receive strong support from the Netherlands in the debate,[84] Mr. Stabell of Norway eventually amended his country's proposal to include a reference to "historic title or other special circumstances" as being exceptions to the median line.[85]

When the Committee came to vote, the Norwegian amendment was accepted, so that both the 'historic title or other' and 'special circumstances' criteria were incorporated into the Draft.[86] As a consequence of the voting on Article 12, which had the effect of merging Articles 12 and 14, it was declared unnecessary to consider the proposed amendments to draft Article 14.[87] After some drafting changes were adopted to Article 12,[88] the Report of the First Committee[89] was sent to the plenary session of the Conference for consideration.

(d) The Draft Articles in the Plenary Sessions.

At the Nineteenth Plenary meeting of the Conference the amended Draft Article 12 was adopted with little debate by 76 votes to none, with 1 abstention.[90] To complete the review of the Conference debates on the delimitation of maritime boundaries between opposite and adjacent States, it should be noted that during the discussion of the International Law Commission's Draft Article 66, which dealt with the right of a coastal state to exercise control over a contiguous zone for customs, fiscal or sanitary reasons,[91] it was realized that if the Conference accepted this new proposed zone, a delimitation method would have to be provided similar to that used for the territorial sea and continental shelf. Consequently the First Committee adopted a Yugoslav[92] proposal providing for the median line to delimit the Contiguous Zone.[93] The delimitation principles of Draft Article 12 were also incorporated into the text of the Convention on Fishing and Conservation of the Living Resources of the High Seas.[94]

At a later stage a revised text proposed by the Drafting Committee of the First Committee[95] was adopted after it had been pointed out that several minor inconsistencies existed between Draft Articles 12 and 66.[96] Finally the Conference adopted an Indian proposal[97] which incorporated the First Committee's work on the Contiguous Zone into the Convention on the Territorial Sea and Contiguous Zone.[98] That Convention was adopted by 61 votes to none with 2 abstentions.[99]

(e) The Convention on the Territorial Sea and Contiguous Zone

The Conference Draft Article 12 eventually became Convention Article 12, which provided:

1. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled,

failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision.

2. The line of demarcation between the territorial sea of the two States lying opposite to each other or adjacent to each other shall be marked on large-scale charts officially recognized by coastal States.[100]

The relevant paragraph of Draft Article 66, which became part of Article 24 in the Convention provided:

3. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its contiguous zone beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two States is measured.[101]

The Convention on the Territorial Sea and Contiguous Zone entered into force on 10 September 1964 and had 46 contracting parties at 31 December, 1982.[102] Of the

17 countries who made either a reservation or a declaration to the Convention, Venezuela was the only one to refer to Article 12, when it explicitly pointed out that special circumstances existed in the case of the Gulf of Paria, the area adjacent to the island of Aruba and also the Gulf of Venezuela.[103] Venezuela also made an express reservation to paragraph 3 of Article 24 of the Convention.[104]

4. THE OPINIONS OF NOTED AUTHORS ON THE CONVENTION

It will be now of interest to survey the views of various commentators which were published in the years immediately following the Conference before there had been an opportunity for the conventions to be put into practice. With respect to the delimitation principles it was noted that while the median/equidistance line seemed to be the fairest applicable method, problems would arise due to it being unclear as to which method was to be used in different circumstances.[105] One commentator did note that the median line principle: "...represents what can be regarded as a point of departure. It will, at least, provide an acceptable basis for further negotiations in case the Contracting Parties fail to agree on any other method."[106] Most post-Conference comment centered on Article 6 of the Convention on the Continental Shelf, probably because this was an area of interest at the time due to the Continental Shelf regime gaining a great deal of credibility, following the Conference and, as will be noted in the next chapter, many boundary delimitations were occuring

Concern was expressed over the meaning of special circumstances and when it would be applicable.[107] One commentator, a member of the United Kingdom delegation to the 1958 Conference, noted that the special circumstances criterion would be of particular use: "Where the continental shelf underlies an area of shallow sea, such as the Persian Gulf, which has many islands and is surrounded by the coasts of opposite or adjacent States, the drawing of the boundary on the strict principle of the median line, could, it is clear, result in many curious and inequitable deflections of the median line."[108] Another case where this exception to the general principle was seen to be useful was where mineral deposits were found in the continental shelf area, over which a true median line would take no account. In such a case, Katin argued that the special circumstances criterion would allow for the unity of the deposit to be retained, account to be taken of prior investment and exploitation, or for the possibility of joint exploitation to be considered.[109]

In an extensive article by Padwa,[110] he noted that special circumstances could also be claimed where one State sought to draw its baseline for delimitation purposes from artificial harbour works,[111] or where the coastline was constantly changing as in the case of a delta.[112] He concluded that the criterion was one which had to be claimed in good faith[113], with reference to an objective standard,[114] noting that: "This conclusion rests on the implicit assumption that the presence or absence of 'special circumstances' is a question of fact to be decided according to the merits of each particular case..."[115] The main comment of McDougal and Burke on the provisions on Article 6 was that no arbitration provision was provided for in the Convention on the Continental Shelf, contrary to the Draft Article as recommended by the International Law Commission,[116] and consequently it opened the door for a State to: "Insist that special circumstances require a boundary line different from the median line or one based on the principle of equidistance."[117]

With reference to Article 12 of the Convention on the Territorial Sea and Contiguous Zone, McDougal and Burke acknowledged that the problem which was of concern to Norway had in fact been solved by the first sentence in the Article,[118] but that this certainty had been destroyed in the second sentence with its reference to special circumstances and historic title. Their conclusion was that: "The result is a prescription which seems to state that one of the states is entitled to insist upon extending its territorial sea beyond the median line, irrespective of failure to reach agreement, if, special circumstances make this necessary. The assumption again appears to be, ..., that an international tribunal would be available to determine whether or not special circumstances or historic title actually could be said to exist."[119] They continued by criticizing the absence of an arbitration provision in the Convention, arguing that as a consequence, it: "...will promote decisions based on the largely irrelevant current positions of strength of the contracting states.[120] Padwa argued that Article 12 presupposed a lack of agreement among the parties, but that instead of saying what the boundary is, it rather says what the boundary is not.[121] Otherwise, he saw no clear distinction between this Article and Article 6 of the Continental Shelf Convention.

5. CONCLUSION

As noted at the beginning of this Chapter, the results of the 1958 Law of the Sea Conference were most remarkable when it is considered that for the previous half-century all attempts to codify the developing Law of the Sea had failed, and yet in two months at Geneva, four Conventions were produced which altogether contained 106 articles. The Conference delegates also considered the developing Law of the Sea to be of such importance that they passed a resolution calling for a second Conference to be held in the future.[122] Yet from the review of the Draft Articles progression through the Committee and Plenary Sessions, it was obvious that there was at times much division among the delegates. During the debates in the Fourth Committee on the continental shelf, it was the Yugoslav proposal to delete the reference to special circumstances in the Draft which caused the most dissent. Eventually the joint Netherlands-United Kingdom proposal paved the way for Article 6 of the Continental Shelf Convention to be adopted.

The special circumstances criterion was also the center of debate in the First Committee, with Yugoslavia again proposing an amendment to delete any reference to that principle wiwth Norway also suggesting an amendment which did not include a reference to 'special circumstances'. The Norwegian delegation eventually succumbed to pressure from other delegates to reinstate a reference to special circumstances, and in so doing guaranteed the passage of their amendment which sought to overcome the problems caused by States claiming different breadths of territorial sea. Not only was the special circumstances criterion a concern to the delegates at the Conference, but it also troubled many writers who commented on the Convention Articles. While it was argued that the term was uncertain, it must be acknowledged that by its inclusion it allowed for a deviation from the strict median or equidistance line in those cases where the application of those principles would cause an inequitable result.

The following Chapter will deal with how these provisions in the Law of the Sea Conventions were put into effect in the years following their coming into force.

FOOTNOTES

[1] U.N. Doc. No. A/3159

[2] Ibid. p. 28

[3] Resolution 1105(XI), Official Records of the General Assembly, Eleventh Session, Supplement No. 17, U.N. Doc. No. A/3572, p. 54

[4] U.N. Doc. No. A/CONF. 13/SR. 1

[5] U.N. Doc. No. A/CONF. 13/SR. 13

[6] Supra No. 1, Chapter II - II

[7] Supra No. 3

[8] U.N. Doc. No. A/CONF. 13/35.

[9] First United Nations Conference of the Law of the Sea. Geneva, Switzerland. February 24 - April 27, 1958, Volume II: Plenary Meetings. p. xii - xxvii, (1980 Reprint)

[10] Supra No. 3, P. 7(a)

[11] U.N. Doc. No. A/CONF. 13/5 and Add. 1 to 4

[12] Ibid. No. 13, Article 72. See: Supra, Chapter 2 for a discussion of ~~the~~ Grisbadarna Case between Norway and Sweden; also; Scott's Hague Court Reports 121

[13] U.N. Doc. No. A/CONF. 13/5 and Add. 1 to 4. No. 18, Article 72

[14] U.N. Doc. No. A/CONF. 13/C.4. SR.7, p. 14, per Mr. Caicedo Castilla

[15] U.N. Doc. No. A/CONF. 13/C.4. SR. 10, p. 29 per Mr. Carmona

[16] U.N. Doc. No. A/CONF. 13/C.4. SR. 10, p. 35 per Mr. Douik

[17] U.N. Doc. No. A/CONF. 13/C.4./L.16

18 U.N. Doc. No. A/CONF. 13/C.4. SR. 31, p. 4. Note: those delegates who spoke in favour of the 'special circumstances' criterion were: Mr. Rouhani (Iran), Ibid. p. 9; and, Mr. Schwarck Anglade (Venezuela), Ibid. p. 19.

19 U.N. Doc. No. A/CONF. 13/C.4./L.23

20 U.N. Doc. No. A/CONF. 13/C.4. SR. 31, p. 31 per Mr. Mouton

21 U.N. Doc. No. A/CONF. 13/C.4./L.28

22 U.N. Doc. No. A/CONF. 13/C.4. SR. 31, p. 15 per Miss Gutteridge

23 U.N. Doc. No. A/CN. 4/61/Add 1 Annex. See: Supra Chapter 3

24 U.N. Doc. No. A/CONF. 13/C.4. SR. 32, p. 2

25 Ibid. p. 3

26 Ibid. p. 4

27 Ibid. p. 25 per Miss Whiteman

28 Ibid. p. 29 per Mr. Carty

29 Ibid. p. 5 per Mr. Gabrielli

30 Ibid. p. 14

31 Ibid. p. 21

32 Ibid. p. 29

33 See: Venezuelan Amendment U.N. Doc. No. A/CONF. 13/C.4./L.42

34 U.N. Doc. No. A/CONF. 13/C.4. SR. 32, p. 9 per Mr. Schwarck Anglade

35 Ibid. p. 11 per Mr. Caicedo Castilla

36 Ibid. p. 14

37 Ibid. p. 21

38 U.N. Doc. No. A/CONF. 13/C.4. SR.33, p. 1

39 Ibid. p. 3 per Mr. Jhirad

40 Ibid. p. 4 per Mr. Patey

41 Ibid. p. 6

42 Ibid. p. 9

43 Ibid. p. 25, 26

44 Ibid. p. 24

45 Ibid. p. 23

46 Ibid. p. 27; p. 28 - the joint amendment being adopted by 29 votes to 17, with 8 abstentions; p. 29; p.32 - the joint amendment being adopted by 29 votes to 16, with 9 abstentions; p. 33 - the joint amendment being adopted by 32 votes to 16, with 6 abstentions.

47 U.N. Doc. No. A/CONF. 13/L.12

48 U.N. Doc. No. A/CONF. 13/L.15

49 U.N. Doc. No. A/CONF. 13/SR. 9, p. 5

50 Ibid. p. 6

51 The Convention was adopted by 63 votes to none, with 2 abstentions, U.N. Doc. No. A/CONF. 13/SR. 18, p. 31

52 U.N. Doc. No. A/CONF. 13/L.55, Article 6

53 U.N. Doc. No. ST/LEG/SER. E/2

54 Ibid. p. 627

55 Ibid.

56 Ibid. p. 626 - 627

57 Ibid. p. 626

58 Ibid. This is a reference to the Republic of China

59 Ibid.

60 Ibid. p. 628

61 U.N. Doc. No. A/CONF. 13/5 and Add. 1 to 4, No. 13

62 Ibid. Article 12, p. 1

63 See: U.N. Doc. No. A/CN. 4/97 and Add. 1 to 9, No. 18, Regime of the Territorial Sea - Article 14 and 15; Supra. Chapter 3

64 U.N. Doc. No. A/CONF. 13/5 and Add. 1 to 4, No. 13 - Article 12, p. 1

65 Ibid. Article 14

66 U.N. Doc. No. A/CONF. 13/C.1/L/97

67 U.N. Doc. No. A/CONF. 13/C.1. SR. 60, p. 44

68 U.N. Doc. No. A/CONF. 13/C.1./L.60

69 U.N. Doc. No. A/CONF. 13/C.4./L16. supra p. 3

70 U.N. Doc. No. A/CONF. 13/C.1.SR. 60, p. 8 per Mr. Katicic

71 U.N. Doc. No. A/CONF. 13/C.1./L.101; U.N. Doc. No. A/CONF. 13/C.1. SR.60, p. 12 per Mr. Boavida

72 Ibid. p. 42 per Mr. Tuncel.

73 Ibid. p. 38

74 Ibid. p. 36

75 U.N. Doc. No. A/CONF. 13/C.1./L.121, L.129

76 U.N. Doc. No. A/CONF. 13/C.1. SR.60, p. 9

77 U.N. Doc. No. A/CONF. 13/C.1/L.97; U.N. Doc. No. A/CONF. 13/C.1. SR. 60. p. 18 per Mr. Stabell

78 U.N. Doc. No. A/CONF. 13/C.1. SR. 61, p. 5, 7 per Mr. Shukairi

79 Ibid. p. 11

80 Ibid. p. 13, 14 per Sir Claude Corea

81 Ibid. p. 17 per Mr. Ago

82 Ibid. p. 14, 17. Supra n. 46

83 Ibid. p. 11

84 Ibid. p. 20 - 22 per Mr. Verzijl

85 Ibid. p. 31

86 Ibid. p. 43. The term 'historic title or other' was adopted by 25 votes to 13 with 31 abstentions, while the phrase 'special circumstances' was adopted by 38 votes to 7 with 22 abstentions. Note: that paragraphs 2 and 3 were omitted from the Draft Article, Ibid. p. 43; for the reasons why, See: U.N. Doc. No. A/CONF. 13/C1. SR.60, p. 20, 21 and, U.N. Doc. No. A/CONF. 13/C1. SR.61, p. 12

87 U.N. Doc. No. A/CONF. 13/C1. SR.61, p. 46

88 U.N. Doc. No. A/CONF. 13/C1. SR. 65, p. 32

89 U.N. Doc. No. A/CONF. 13/L.28/Rev.1

90 U.N. Doc. No. A/CONF. 13/SR. 19, p. 32

91 U.N. Doc. No. A/3159. Chapter II-II, Article 66

92 U.N. Doc. No. A/CONF. 13/C1./L.54

93 U.N. Doc. No. A/CONF. 13/C1./SR.58, p. 21. The amendment was adopted by 52 votes to 3, with 19 abstentions.

94 See: Article 7(5), U.N. Doc. No. A/CONF. 13/L.54

95 U.N. Doc. No. A/CONF. 13/C1./L.167

96 U.N. Doc. No. A/CONF. 13/SR. 64, p. 5. Article 66 underwent further amendment when it reached the plenary session of the Conference, but the paragraph dealing with delimitation remained the same; See: U.N. Doc. No. A/CONF. 13/L.31, and, U.N. Doc. No. A/CONF. 13/SR. 14, p. 64

97 U.N. Doc. No. A/CONF. 13/SR. 20, p. 54

98 Ibid. p. 76

99 Ibid. p. 126

100 U.N. Doc. No. A/CONF. 13/L.52. Article 12

[101] Ibid. Article 24(3)

[102] U.N. Doc. No. ST/LEG/SER. E/2

[103] Ibid. p. 611. See: Treaty relating to the Submarine Areas of the Gulf of Paria between the United Kingdom and Venezuela, signed on 26 February 1942, in, United Nations Legislative Series, Laws and Regulations on the Regime of the High Seas, p. 44, and; Supra. Chapter 2 for a discussion of this Treaty

[104] Ibid

[105] See: Young, A Symposium on Limits and Conflicting Uses on the Continental Shelf, in, The Law of the Sea. Offshore Boundaries and Zones, ed. Alexander, 179 (1967); Young, The Geneva Convention on the Continental Shelf; A First Impression, 52(1958) A.J.I.L., 733 at 737

[106] Chukwurah, Settlement of the Boundary Disputes in International Law, 73(1967)

[107] Op Cit. Young, A Symposium on Limits and Conflicting Uses on the Continental Shelf, p. 180; Katin, The Legal Status of the Continental Shelf as Determined by Conventions Adopted at the 1958 United Nations Conference on the Law of the Sea: An Analysis of an Instance of International Law Making, 222(1962); Grisel, The Lateral Boundaries of the Continental Shelf and the Judgment of the International Court of Justice in the North Sea Continental Shelf Cases, 64(1970) A.J.I.L., 562 at 579 - 584

[108] Gutteridge, The 1958 Geneva Convention on the Continental Shelf, 35(1959) The British Yearbook of International Law, 102 at 120. For a discussion of the continental shelf in the Persian Gulf, See: Petroleum Development Ltd. v. Sheik of Abu Dhabi (The Abu Dhabi Arbitration), 1951 I.L.R. 144 at 154-158

[109] Op Cit. Katin, p. 224 - 225

[110] Padwa, Submarine Boundaries, 9(1960) 4th Series, International and Comparative Law Quarterly, 628 - 653

[111] Ibid p. 646

[112] Ibid.

[113] Ibid. p. 643

[114] Ibid. p. 651

[115] Ibid.

[116] See: Article 73, Draft Article Concerning the Law of the Sea submitted by the International Law Commission, U.N. Doc. No. A/3159, Chapter II-II

[117] McDougal and Burke, The Public Order of the Oceans - A Contemporary International Law of the Sea, 729(1962)

[118] Ibid. p. 435

[119] Ibid.

[120] Ibid. p. 436

[121] Op Cit. Padwa. p. 638

[122] U.N. Doc. No. A/CONF. 13/L.25; U.N. Doc. No. 13/SR. 21, p. 56

CHAPTER 5

"CASE STUDIES OF MARITIME BOUNDARY DELIMITATIONS BETWEEN STATES"

The purpose of this Chapter is to take a detailed look at the major maritime boundary disputes that have occurred since the 1958 Law of the Sea Conventions. Emphasis will be given to the 1969 North Sea Continental Shelf Cases[1] and the 1982 Tunisian - Libyan Continental Shelf Case[2], these being the leading continental shelf boundary decisions handed down by the International Court of Justice. The decision in the 1977 Anglo-French Arbitration[3] will be referred to, as also will be the current disputes between Australia and Indonesia, the People's Republic of China and its neighbours in the Yellow and East China Seas, and Canada and the United States. The 1978 Torres Strait Treaty[4] between Australia and Papua New Guinea will be studied in detail because of its importance as a boundary delimitation which was achieved purely through negotiation. Various other maritime boundary agreements will also be referred to. As there are approximately 376 maritime boundaries in the world[5], it is not the purpose of this Chapter to discuss every dispute or possible solution to each dispute, rather each case will be discussed on its own merits, with little reference to similar cases or decisions, this later task being the object of the final chapter.

1. THE NORTH SEA CONTINENTAL SHELF CASES

(a) The Issue before the Court

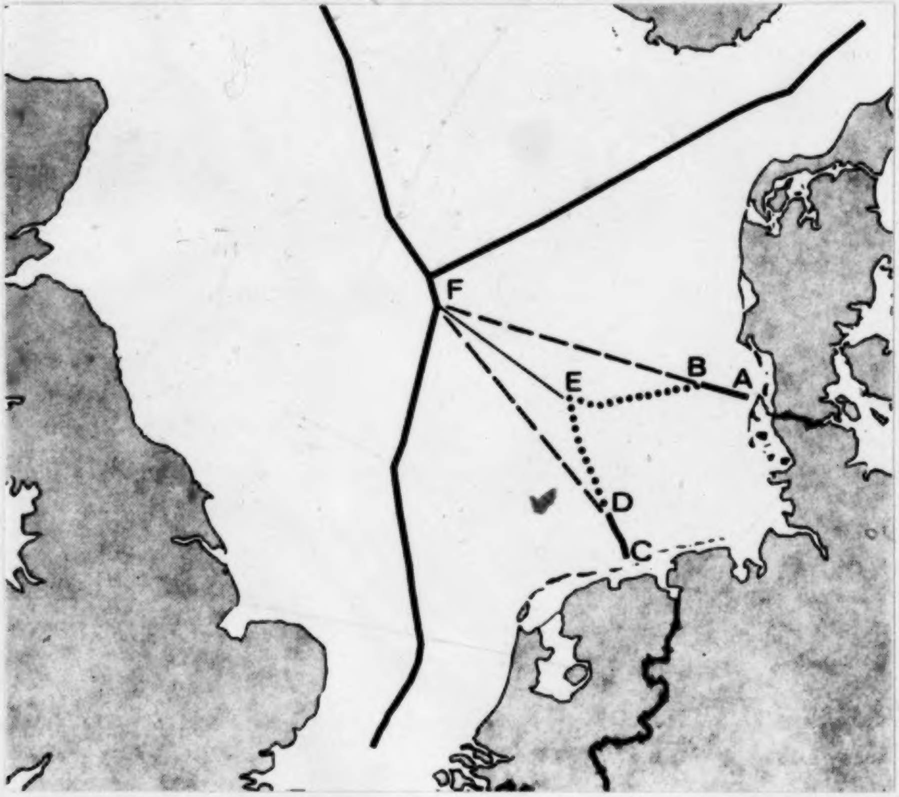
The first real test for the provisions of Article 6 of the Convention on the Continental Shelf was the North Sea Continental Shelf Cases[6] which arose out of a dispute between the Federal Republic of Germany and Denmark and the Netherlands over their respective continental shelf boundaries in the North Sea. Previous to the dispute, agreement had been reached between the Federal Republic and the Netherlands on the lateral delimitation of their continental shelf for a short distance from the coast in December 1964[7], and also between the Federal Republic and Denmark for a similar delimitation of the continental shelf in June 1965.[8] Yet while both boundaries had been drawn on the basis of the equidistance principle[9], they only extended part way offshore and when the parties came to negotiate the continental shelf boundary all the way into the North Sea they discovered that due to a difference as to what delimitation principles were to be applied, no agreement could be reached.

The parties resolved to submit their dispute to the International Court of Justice, and in two separate agreements made on 2 February 1967 the following question was agreed to be put to the Court: "What principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determination by the above-mentioned Convention...?"[10] In the Memorials submitted to the Court by the respective parties, West Germany argued that the delimitation of the continental shelf should be based on the principle that each coastal State was 'entitled to a just and equitable share'[11], that the rule of equidistance was not a rule of customary international law[12], that the equidistance rule was not applicable unless the parties had agreed to its use by way of agreement or arbitration[13], and that it was not an appropriate principle for use in this case as it would not apportion a just and equitable share of the continental shelf to West Germany.[14] In the Counter Memorials issued by Denmark and the Netherlands it was argued that delimitation in this case was to be governed by the principles and rules of international law as laid down in Article 6, paragraph 2 of the 1958 Convention on the Continental Shelf,[15] that the principle of equidistance should be used in the delimitation[16], and that no special circumstances had been established in this case which justified another boundary line.[17] Of some significance was that while Denmark[18] and the Netherlands[19] had both ratified the 1958 Convention on the Continental Shelf, West Germany had not done so, though it had signed the Convention in 1958.[20]

(b) Judgment of the Court

At the conclusion of the Court's statement of the facts, an observation was made with respect to the

FIGURE 3



A - B Line	Boundary of 9 June between the Federal Republic of Germany and Denmark
C - D Line	Boundary of 1 December between the Federal Republic of Germany and the Netherlands
E - F Line	Boundary of 31 March 1966 between the Netherlands and Denmark
B - E Line	Boundary claimed by Denmark with the Federal Republic of Germany
D - E Line	Boundary climed by the Netherlands with the Federal Republic of Germany
———	Agreed Boundaries between the United Kingdom/Norway-Denmark-Netherlands and Norway/Denmark

consequences which followed from the application of the equidistance line in the case of a concave coastline, which was the geographical configuration of the West German coast. The Court commented that: "...in the case of a concave or recessing coast..., the effect of the use of the equidistance method is to pull the line of the boundary inwards, in the direction of the concavity. Consequently, where two such lines are drawn at different points on a concave coast, they will, if the curvature is pronounced, inevitably meet at a relatively short distance from the coast, thus causing the continental shelf area they enclose, to take the form approximately of a triangle with its apex to seaward and, as it was put on behalf of the Federal Republic, 'cutting off' the coastal State from the further areas of the continental shelf outside of and beyond this triangle."[21]

The Court found itself unable to accept the contentions of West Germany; making a distinction between delimitation and apportionment of the continental shelf, in that while it was within the Court's scope to delimit in an equitable manner, it could not apportion the continental shelf between the parties in a just and equitable manner.[22] The Court then turned to the argument of the Netherlands and Denmark which emphasized the importance of the equidistance principle. After referring once again to the effect the use of an equidistance line would have in certain cases,[23] the Court concluded that: "...the notion of equidistance as being logically necessary, in the sense of being an unescapable a priori accompaniment of basic continental shelf doctrine, is incorrect."[24] This conclusion was partly justified by noting that it was not until the International Law Commission received the report from the Committee of Experts in 1953 that it gave consideration to the equidistance principle[25], and that even when the matter was considered at the 1958 Law of the Sea Conference, the major emphasis was to obtain a delimitation agreement through the use of equitable principles.[26]

The Court's conclusion on the principle of equidistance was that the International Law Commission had proposed its adoption: "...with considerable hesitation, somewhat on an experimental basis, at most de lege ferenda, and not at all de lege lata or as an emerging rule of customary international law."[27] Also of significance to the Court was that Article 6 of the Convention on the Continental Shelf was one of the articles to which a reservation could be made.[28] The Court finally concluded that recognition of the equidistance principle in the 1958 Convention on the Continental Shelf had not become a principle of customary international law[29] and that since West Germany had not ratified the 1958 Convention, the Parties were under no obligation to apply either the Convention or the principle of equidistance[30] in the delimitation of their continental shelves. Following this finding, it became unnecessary for the Court to determine whether 'special circumstances' applied in this case.[31]

(c) The rules of Delimitation laid down by the Court

The Court then proposed a set of rules which States were to follow in all delimitations; these being, (1) that the parties were obliged to enter into negotiations with a view to arriving at an agreement, (2) that equitable principles were to be applied, and (3) that the continental shelf was a natural prolongation of a coastal State's land territory and it could not encroach upon the natural prolongation of the territory of another State.[32] While the Court was prepared to accept that in certain cases where equity was applied, the equidistance principle would be acceptable, in some geographical circumstances the use of that principle caused an inequitable result, as was the instance in this case.[33] The Court then considered what factors should be taken into account by the parties so as to obtain an equitable delimitation, accepting as being relevant, the need to consider the geographical configuration of the coastline,[34] the unity of any seabed mineral deposits,[35] and the need for a reasonable degree of proportionality between the length of the coastline and the extent of the continental shelf claimed.[36]

The Court then passed final judgment on the case, holding by eleven to six that the relevant principles of international law to be adopted by the parties in the delimitation of their continental shelves were: "(1) delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other; (2) if, in the application of the preceeding sub-paragraph, the delimitation leaves to the Parties areas that overlap, these are to be divided between them in agreed proportions or, failing agreement, equally, unless they decide on a regime of joint jurisdiction, user, or exploration for the zones of overlap or any part of them."[37]

The judgment then went on to indicate the factors which were to be taken account of during the negotiations: "(1) the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features; (2) so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved; (3) the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region."[38]

(d) Post-Judgment Treaties between the Parties

Following the decision by the Court, two treaties were signed by the parties in 1971 which provided for the delimitation of their continental shelf boundaries by the methods specified in the judgment.[39]

(e) Comment on the Case

The subsequent analysis of the case saw many commentators emphasize the importance the Court had placed on the inability of the 'equidistance' principle to be an equitable method of delimitation in the case of sharply indented or concave coastlines. Some were unable to reconcile the Court's distinction between a natural and unnatural coastline,[40] it being noted that: "It is indeed a puzzle why the court should try to compensate for a geographical disadvantage, namely a convex coast, which they judge unnatural, when they apparently accept so many other inequalities, which could be defined as unnatural by the same logic. So long as the earth's surface is divided amongst sovereign states there will be geographical inequalities and some States will benefit from the facts of geography and others will be placed at a disadvantage. Would the court consider it natural and equitable that Switzerland should have no claim to any continental shelf, and that Zaire, a large, populous country, should only be able to claim a small sliver of a very narrow continental shelf?"[41] Other commentators noted that with the rejection by the Court of the equidistance principle and its emphasis on equity, that an increase in litigation could be expected due to the principles of delimitation now being uncertain.[42]

One of the most comprehensive comments on the case is to be found in an article by Grisel, who applauds the rejection by the Court of the equidistance principle[43] and its acceptance of delimitations based on 'equitable principles' and 'natural prolongation'. He notes that these two principles: "...not only are consistent with the history and ratio legis of the doctrine of the continental shelf, but indeed form the fundamental features in the allotment to individual states of sovereign rights over the seabed and its subsoil."[44] Yet while he believes that the test laid down by the Court provides a means by which to: "...formulate the goal to be achieved rather than the means to reach it...,"[45] he firmly approves of the criteria on the grounds that the issue of continental shelf delimitation is so complex that it is not possible to resolve the matter through precise legal rules.[46] While he notes that leaving the matter entirely to the agreement of the parties can lead to difficulty in certain cases, this was the only approach the Court could take as: "...no substantive rules could be set forth, the application of which could lead to equitable results in most situations. Since the problem of the lateral boundaries of the continental shelf is not justiciable, the wisest solution is to leave the parties free in each case to determine by agreement between themselves the most appropriate frontier line."47

This decision by the International Court set the standard for maritime boundary delimitations during the 1970's and as will be seen in the following case examples its judgment was referred to on many occasions by disputing parties.

2. THE ANGLO-FRENCH ARBITRATION

(a) The Issue before the Court

In 1975 the United Kingdom and France signed an Agreement establishing a Court of Arbitration to determine their dispute over the continental shelf boundary in the English Channel and Atlantic Ocean. The following matter was submitted to the Court for its decision: "What is the course of the boundary (or boundaries) between the portions of the continental shelf appertaining to the United Kingdom and the Channel Islands and to the French Republic, respectively, westward of 30 minutes west of Greenwich Meridian as far as the 1,000 metre iosbath?"48

The portion of the English Channel in which the Court was asked to delimit the boundary ran from an area adjacent to the English Coast, south-east of the Isle of Wright, passing to the south-west out into the Atlantic Ocean proper between the Scilly Isles, which lay off south-west Britain, and the island of Ushant, which lay 14.1 miles from the mainland and was the most westerly point in France. Of those geographical features which were of importance in the region, mention should be made of the Channel Islands, which are made up of four main groups of islands with a total population of 130,000 and were situated in the Golfe breton-normand, the gulf formed near the French coasts of Normandy and Brittany.[49] Northeast of the Channel Islands lay a trough known as the Hurd Deep, which had a width of between one and three nautical miles and a depth of over 100 metres and was part of a seabed which had a characteristic geological continuity between the English and French coasts[50]; this essential continuity in the continental shelf was maintained in that area known as the Atlantic region in which the seabed continued out in a south-westerly direction till it reached the 1,000 metre iosbath.[51] The Scilly Isles, a group of 48 islands with a total population of 2,428, lying 21 miles off Land's End, also were important geographical features. It was accepted that the Scilly group was geologically a natural prolongation of the Cornish peninsula and an integral part of the United Kingdom land mass.[52]

(b) Memorials submitted by the parties

In the French memorial, emphasis was placed on the reservation which had accompanied their acceptance of the 1958 Convention on the Continental Shelf[53] in which it was declared that for Article 6 of that Convention, Granville Bay constituted a 'special circumstance'.[54] Consequently France argued that the customary law principles of natural prolongation of land territory and delimitation in accordance with equity, as emphasized in the North Sea Continental Shelf Cases, were applicable in this case.[55] In respect to the Channel sector, France submitted that a median line would constitute an appropriate boundary,[56] with an allowance being made for the Channel Islands by way of 6 mile enclaves.[57] In the Atlantic region the French proposed a boundary based on the bisector of two lines following the continuation of the general direction of both coasts.[58]

The United Kingdom rejected the French reservation in its memorial, as it had similarly done when the reservation was first lodged[59], and argued that delimitation should be based on Article 6 of the Convention on the Continental Shelf.[60] Consequently, it was proposed that the appropriate boundary was a median line, giving full effect to the Channel Islands, it being argued that the French had failed to prove 'special circumstances' in the case of Granville Bay.[61] The drawing of a median line was also advocated in the Atlantic sector.[62]

(c) The Judgment of the Court

The first point made by the Court in its judgment was that it lacked jurisdiction to delimit the seabed between the Channel Islands and the French mainland,[63] and that it consequently could only deal with the continental shelf areas to the north and west of the Channel Islands.[64] The Court then began an extensive discussion of the effect to be given to the French declaration regarding Article 6,[65] and the United Kingdom objection to that reservation.[66] It was concluded that the Convention on the Continental Shelf was still in force between the parties,[67] despite the discussions taking place at the Third United Nations Conference on the Law of the Sea and current State practice.[68] The combined effect of the reservation and the objection was held to render Article 6 inapplicable between the parties to the extent of the reservation,[69] which resulted in excluding the operation of the Article in the area of Granville Bay and the adjacent Channel Islands and allowing for the rules of customary law to apply instead.[70]

It was found that Article 6 provided a combined equidistant-special circumstances rule,[71] in which a boundary based on an equidistance line was the general principle unless another was justified by 'special circumstances'.[72] The Court noted that the 'special circumstances' criterion was: "...to ensure an equitable delimitation; and the combined 'equidistance-special circumstances rule' in effect gives particular expression to a general norm that, failing agreement, the boundary between States abutting on the same continental shelf is to be determined on equitable principles."[73] Stressing that the rules of delimitation in both Article 6 and customary law strive for the goal of an equitable result[74], the Court went on to review the customary law principles referred to by the International Court in the North Sea Continental Shelf Cases.[75] In response to argument that Article 6 did not apply due to the seabed being neither opposite or adjacent both coasts, the Court noted that the provisions of the Article were designed to comprehensively cover the delimitation of the continental shelf in all situations, even if the respective coasts are not exactly opposite or adjacent.[76]

Before moving on to the facts of the case, the Court again stressed that the fundamental norm of delimitation was that equitable principles be applied, and that the particular principles applied reflect the geographical or other relevant circumstances of each case.[77] The Court rejected that there existed a 'proportionality' factor which was applicable in all cases of continental shelf delimitation, its applicability depending on the geographical circumstances of the case.[78] It was concluded that with respect to the relationship of the natural prolongation of the continental shelf test and the need for proportionality, that: "...there can never be a question of completely refashioning nature, such as by rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline; it is rather a question of remedying the disproportionality and inequitable effects produced by particular geographical configurations or features in situations where otherwise the appertunance or roughly comparable attribution of continental shelf to each State would be indicated by geographical factors."[79]

(i) The English Channel

In the region of the English Channel the Court delimited the seabed on the basis of the median line using the principle of equidistance.[80] The presence of the Hurd Deep was not accepted as constituting a special circumstance due to the fact that it did not disrupt the essential unity of the continental shelf in either the Channel or Atlantic region.[81] In justifying its use of an equidistance line, the Court referred to cases in which its application would not be acceptable, such as where: "...some geographical feature amounts to a 'special circumstance' justifying another boundary under Article 6, or, by rendering the equidistance line inequitable, calls under customary law for the use of some other method. It follows that any alternative boundary would have to be one justified by the 'special circumstances' or one apt to correct the inequity caused by the particular geographical feature."[82] No such geographical feature was found to exist here.

(ii) The Channel Islands

After referring to the political composition of the Channel Islands[83], the Court decided to treat them as islands of the United Kingdom, and not as semi-independent States entitled to their own continental shelf.[84] Noting the various fishing zones that had been proclaimed by the English and French in that region[85], the Court referred to the arguments of the parties based on their local navigational and security concerns. While these concerns were diminished by the importance of the English Channel as an international thoroughfare, it was impossible to dismiss: "...the prominent interest of the French Republic in the southern areas of the English Channel, a predominence which is also strongly indicated by its position as a riparian State along the whole of the Channel's south coast."[86]

It was held that the natural prolongation of continental shelf principle had to be flexible enough to compensate for cases in which the islands of one State lie on the continental shelf of another State, and that considerations of geography, law and equity would determine what effect was to be given to the principle in such a case.[87] Concluding that it would be inequitable for the United Kingdom to claim regular maritime zones around the Channel Islands due to the consequent loss of seabed rights France would suffer,[88] the Court decided to adopt: "...an intermediate solution that effects a more appropriate and more equitable balance between the respective claims and interests of the Parties."[89] Consequently a median line, disregarding the Channel Islands, was drawn between the respective coasts,[90] while a second boundary was drawn to the north and west of the Islands giving them a 12 mile seabed and creating enclaves of United Kingdom jurisdiction in a French zone.[91]

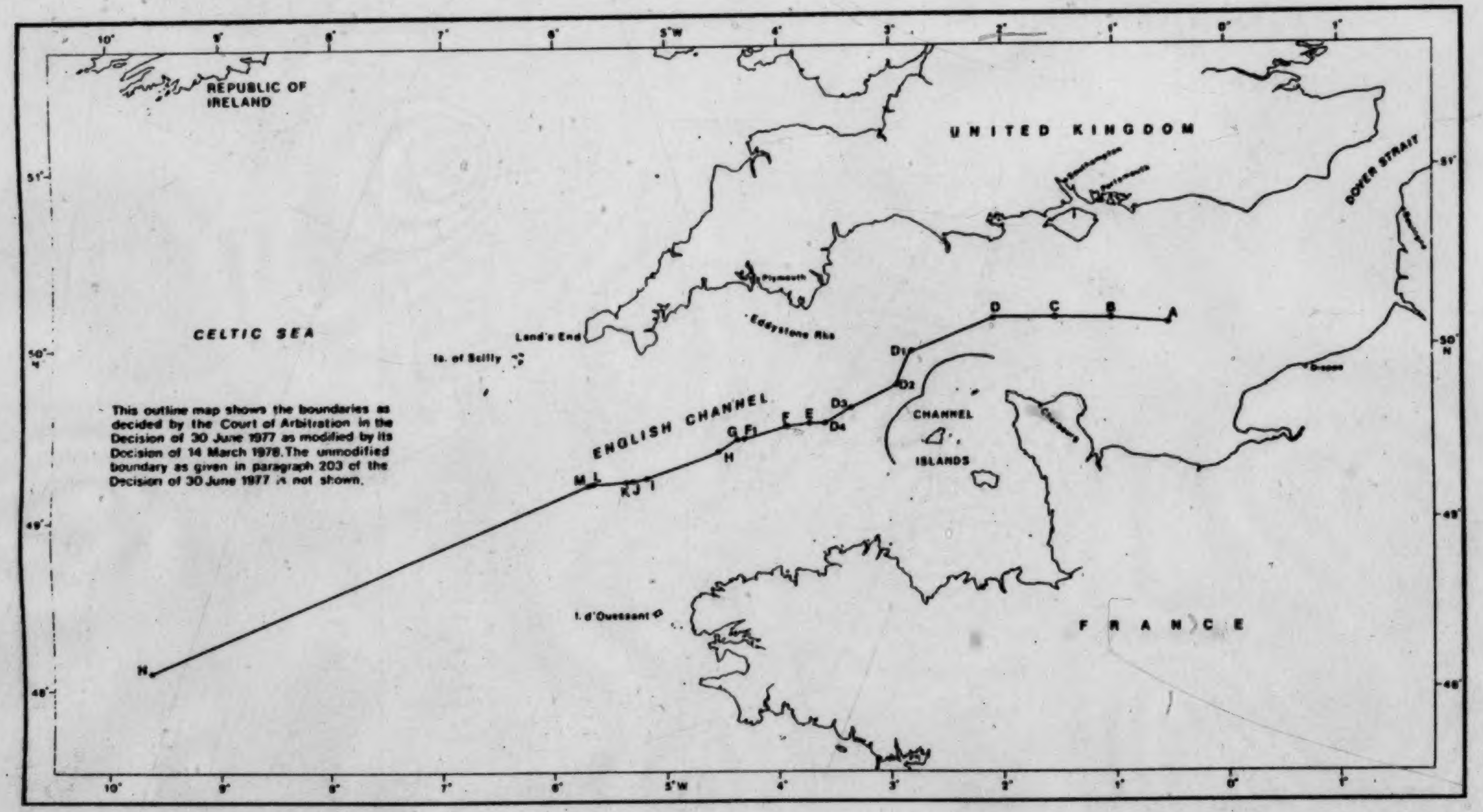
(iii) The Atlantic Sector

In the Atlantic sector it was found that: "...the further projection westwards of the Scilly Isles when superadded to the greater projection of the Cornish mainland westwards beyond Finistere, is much of the same nature for present purposes, and has much the same tendency to distortion of the equidistance line, as the projection of an exceptionally long promontory, which is generally recognized to be one of the potential forms of 'special circumstance'."[92] With this finding by the Court that these Islands were a special circumstance, which justified a line other than a median line,[93] it declared that the boundary should be delimited by giving 'half-effect' to the islands, that is: "...delimiting the line equidistant between the two coasts, first without the use of the offshore island as a base-point and, secondly, with its use as a base-point; a boundary giving half-effect to the island is then the line drawn midway between those two equidistant lines."[94] The Court noted the suitability of this method of giving half-effect to the Scilly Islands due to their being approximately twice the distance from the mainland as the French island of Ushant, which also constituted a basepoint for the delimitation of the median line.[95]

(d) The 1978 Judgment of the Court

In accordance with Article 10(1)[96] of the original Arbitration Agreement, the United Kingdom referred two matters back to the Court for its consideration in 1978. The first issue related to the manner in which the 12 mile enclaves were to be drawn around the Channel Islands, it

FIGURE 4


REPUBLIC OF IRELAND
UNITED KINGDOM
DOVER STRAIT
Plymouth
Eddystone Rks
Land's End
Is. of Scilly
CELTIC SEA
ENGLISH CHANNEL
CHANNEL ISLANDS
I. d'Ouessant
FRANCE
A
B
C
D
D1
D2
D3
D4
E
F
F1
G
H
I
J
K
L
M
N
10°
9°
8°
7°
6°
5°W
4°
3°
2°
1°
0°
1°
51°
50° N
49°
48°

This outline map shows the boundaries as decided by the Court of Arbitration in the Decision of 30 June 1977 as modified by its Decision of 14 March 1978. The unmodified boundary as given in paragraph 203 of the Decision of 30 June 1977 is not shown.

being argued that a discrepancy existed between the delimitation methods in the judgment and the actual co-ordinates contained in the dispositif.[97] The Court found that such a discrepancy did exist,[98] and left it to the Parties to make a corresponding correction to the boundary.[99]

The second issue related to the distortion of the boundary in the Atlantic sector resulting from, the use of charts which did not facilitate the drawing of straight lines on the surface of the earth.[100] While the Court was prepared to accept that some evidence did exist to show that a practice existed whereby charts other than the Mercator projection were used in boundary delimitation, this method was by no means absolute,[101] and consequently the court concluded on the basis of the evidence before it that the techniques used in the calculation of the half-effect boundary were not incompatible with the delimitation methods proposed in the judgment,[102] and that it did not appear to the Court that: "...the delimitation of maritime boundaries by a loxodrome line on a standard navigational chart based on Mercator projection without correction for scale error is either admissible in law or as yet so outmoded in practice as to make its use open, in general to challenge."[103]

(e) Analysis of the Decision

Of the many comments which appeared after the case[104], greatest emphasis was placed on how the award dealt with the two main tests laid down in the North Sea

Continental Shelf Cases. While some appreciated the clarity with which the Court made known its views on the natural prolongation test[105], others emphasized that the test was of no consequence in this case since the continental shelf concerned was part of the natural prolongation of both States.[106] It was suggested that the award confirmed: "...that the concept of natural prolongation may not properly be regarded as relevant to the delimitation of boundaries of the continental shelf between adjacent or opposite States except possibly in a situation where a major geological discontinuity runs laterally seaward from the vicinity of the coastal terminus of the land boundary of adjacent States or lies between the coasts of opposite States."[107]

The second point noted was the emphasis the Court placed on the need to achieve an equitable resolution of the boundary dispute.[108] With respect to the equidistance principle not being a governing factor in every case, it was noted that the award made clear: "...in relation to the Convention, as the North Sea Continental Shelf Cases did for customary law, that there is no overriding principle that requires continental shelf boundaries to be settled according to the rule of equidistance. It also makes clear that the issue at stake in delimitation is one of equity and that each area must be looked at in the light of its geographic and other characteristics."[109] Yet others noted that while the principle of equity was emphasized over that of equidistance, what the Court eventually decided upon was a boundary based on a modified equidistance line.[110] Bowett made the point that: "Indeed, the extent to which the Court relied upon equidistance was considerable. The Court assumed it to be the applicable rule in the 'non-controversial' or mid-Channel areas and also in the narrow waters between the Channel Isles and the French mainland. Even in the two controversial areas, the Court modified rather than rejected equidistance. For the Channel Islands area was given a median line as the primary boundary, and in the South-western approaches the equidistance boundary remained the boundary but was modified by the technique of giving half effect to the Scillies."[111]

The two aspects of the case which attracted the greatest criticism were the effect given to the Scilly and Channel Islands. McRae questioned why the Scilly Islands were considered a special circumstance, noting that it was not clear in the judgment whether the westward prolongation of the United Kingdom's baselines or the existence of the islands themselves were considered the 'special circumstance'.[112] He also questioned the inclusion of the French island of Ushant in the half-effect test propounded by the Court, noting that as a consequence of using the Ushant basepoint in the drawing of both lines that the resulting boundary favoured France to an extent not in accordance with equity.[113] Bowett proposed other tests which could be used in similar circumstances.[114] Brown criticized the Court's decision to give to the Channel Islands only a 12 mile continental shelf,[115] noting that it also had the option of denying the Islands a continental shelf but compensating the United Kingdom with a southward bulge in the median line, or retaining the enclave solution and granting also a limited southward bulge in the median line.[116] In respect to the Channel Island enclaves, Bowett made the point that they were the first such instance in modern State practice.[117]

In their concluding comments on the case, most commentators noted the satisfactory conclusion the Court reached with respect to the relationship between Article 6 of the Convention on the Continental Shelf, customary international law and State practice,[118] while it was also noted that the taking into account by the Court of geographical and geological factors would assist future decision-makers in determing the relevant factors in each case.[119] Though the Court did lay down a series of tests and other relevant circumstances which would be of assistance in future cases: "the whole thrust of the Judgment is that an equitable delimitation can be achieved only by taking into account the situation in the disputed area in its entirety, and by paying special attention to its unique features. Therefore, while it is legitimate, and indeed essential, to characterize situations by reference to their similarities or differences, it must also be recognized that an equitable delimitation in any given case will ultimately depend upon its own peculiar features."[120]

3. THE AEGEAN SEA CONTINENTAL SHELF DISPUTE

(a) Introduction

During the 1970's a dispute arose between Greece and Turkey over their respective seabed rights in the Aegean Sea, and this eventually resulted in a case going before the International Court of Justice in 1978,[121] but due to the Court finding that it lacked jurisdiction, no judgment was rendered on the dispute.[122] Consequently, bi-lateral negotiations have been continued but at present no agreement has been reached.[123]

This seabed dispute flared up in 1973 when Turkey granted petroleum exploration licenses for the submarine areas of the Aegean Sea.[124] This brought a response from the Greek Government, who alleged that these licenses encroached upon the continental shelves of certain Greek Islands which lay close to the Turkish coast and that the licenses were consequently invalid.[125] The dispute then widened into how the continental shelf boundary between the two countries should be drawn in the Aegean Sea, and whether the Greek Islands which lie off the Turkish coast were entitled to a full continental shelf.[126]

(b) The Facts

The beginning of exploration activities in the Aegean by a Turkish vessel in 1974, resulted in an escalation of the dispute when the Greek Government claimed that the seabed being explored was under its jurisdiction.[127] During the next two years there were further negotiations and diplomatic exchanges,[128] until in 1976 the Turkish research-vessel, Mta-Sismik I, began seismic research in a part of the Aegean which was jointly claimed by both parties.[129] This prompted the Greek Government to take its case to the International Court of Justice and the United Nations Security Council.[130]

(c) The Dispute before the Security Council and The International Court

In a Resolution drafted by the United Nations Security Council, on 25 August 1976,[131] the parties were called upon to do everything possible to reduce tension in the area,[132] and to resume negotiations.[133] The Resolution invited the parties: "...to continue to take into account the contribution that appropriate judicial means, in particular the International Court of Justice, are qualified to make to the settlement of any remaining legal differences which they may identify in connection with their dispute."[134]

In the proceedings before the International Court,[135] Greece sought an interim order of protection, in which it requested that the order uphold: "The sovereign rights of Greece for the purpose of researching, exploring and exploiting the continental shelf appertaining to Greece and adjacent to the islands of Samothrace, Limnos, Aghios, Evstratios, Lesbos, Chios, Psara, Antipsara, Samos, Ikaria, and all the islands of the Dodecanese group..."[136] The Greek application also requested the Court: "to adjudge and declare that the Greek islands were entitled to a portion of the continental shelf, the continental shelf boundary between Greece and Turkey in the Aegean Sea, the rights of Greece over its continental shelf, that Turkey was not entitled to undertake activities on the Greek continental shelf, and that current Turkish activities were an infringement of Greek rights."[137] The application for the interim order of protection, which was the only matter considered in 1976, was refused, the Court noting that Turkey's current activities did not involve: "...any risk of physical damage to the seabed or subsoil or to their natural resources."[138]

Following the recommendation of the Security Council that the parties resume negotiations, the 'Berne Agreement on the Continental Shelf'[139] was issued in November, 1976, two months after the judgment of the International Court had been given. The Agreement provided for continuing negotiations on the continental shelf dispute to be conducted through a mixed commission,[140] in good faith,[141] and strict confidence.[142] It was also agreed to study state practice and relevant international rules on delimitation of the continental shelf[143] and to abstain during this time from acts in the Aegean Sea which might prejudice future negotiations.[144] Despite ongoing negotiations between the parties in 1977 and 1978[145], the International Court handed down a judgment based on the original 1976 Greek application in 1978.[146] The Court found that on the basis of a Greek reservation made during its acceptance of the 1928 General Act for the Pacific Settlement of International Disputes,[147], and the invocation of that reservation on a reciprocal basis by Turkey, that the dispute was not within the Court's jurisdiction.[148] A 1975 Joint Communique between the parties,[149] which was relied upon by Greece as a basis for the Court's jurisdiction in the dispute, was also rejected as a basis for the Court's jurisdiction.[150]

(d) The Greek Argument

While no judgment was given by the International Court on the seabed dispute, the arguments of both sides and the proposals of various commentators are worthy of consideration. The Greek argument is based on both the 1958 Convention on the Continental Shelf and customary international law, with the emphasis on the latter due to Turkey not being a party to the Convention.[151] With respect to the Convention, it is noted that since Article 1(b) recognizes the existence of a continental shelf in the seabed adjacent to an island, then a coastal state is fully entitled to claim jurisdiction over the continental shelf of its offshore islands in any delimitation that takes place under Article 6.[152] State practice, it is argued, also confirms that in customary law, islands are recognized as being entitled to claim a continental shelf.[153] Noting both the delimitation techniques found in Article 6 of the Geneva Convention, and also those adopted by the International Court in the North Sea Continental Shelf Cases,[154] the crux of the Greek argument is that: "...the delimitation of the Aegean continental shelf should be made by drawing the median line between the opposite coasts of the Greek islands and those of continental Turkey and its islands."[155] It is claimed that Turkey cannot argue that because of special circumstances a median line is not appropriate, due to the fact that international shipping routes pass through the Greek islands,[156] that Greek operations on the Aegean continental shelf had begun in 1960 without protest from Turkey,[157] and that the islands in question were part of a chain whose economic, political and cultural life is intimately connected with the Greek mainland.[158]

(e) The Turkish Argument

The Turkish argument emphasizes the natural prolongation of its continental shelf into the Aegean Sea, questioning whether the Greek islands have an individual geological shelf due to their close proximity to the Turkish mainland.[159] Referring to both the Continental Shelf Convention and the North Sea Continental Shelf Cases, Turkey proposes that delimitation should take place through negotiation and agreement rather than by the application of the equidistance rule.[160] A Turkish author, who supported his Government's arguments, emphasized the need for delimitation to be based on 'equitable principles', asserting that the Greek islands: "...constitute a geological continuation of the Turkish mainland, and are merely elevations or protrusions on the Anatolian shelf and, therefore, have no shelf of their own in the sense of natural prolongation."[161] In a conclusion to his arguments, this author proposed that: "...the common exploration or exploitation of the natural resources of the submarine areas in dispute might be one of the appropriate measures which could be taken to prevent further complications in the Aegean."[162] At present no evidence exists to show that such an approach has been adopted.

(f) Comments by Bowett[163]

Bowett, in an extensive consideration of the Aegean dispute, makes note of Greece's reluctance to negotiate a boundary which gives less effect to their Aegean islands than they are entitled to in international law, due to their fear that such a concession could lead to a re-opening of the issue of title to the islands.[164] Applying customary law principles propounded by the International Court, he notes that the natural prolongation test has no application in the Aegean Sea because of the existence of a common continuous shelf which does not assist in determining where the 'natural' boundary would lie.[165] Since the 'overlap provision' of the International Court is also inapplicable[166], he goes on to consider whether other subsidiary factors would be of any assistance. With respect to the geographical features of the Aegean, no true equality exists between the parties due to the dominating influence of the Greek islands,[167] and there is also no true degree of proportionality in the area between the extent of the continental shelf and the length of the coastal State's coast.[168] Rejecting the enclave approach adopted in the Channel Islands Arbitration,[169] due to the number of Greek islands involved and their domination of the whole sea area,[170] he proposes instead that each of the Greek islands be granted a joint twelve mile territorial sea and continental shelf zone, through which Turkey could not penetrate into the central Aegean except by way of three corridors which would exist between the outer limits of the Greek maritime zones and would give access to the Aegean between the islands of Evstratios and Lesvos, Lesvos and Khios, and Khios and Ikaria.[171] Having based this delimitation on customary law and the developments which were taking place at the Third United Nations Law of the Sea Conference, he noted that: "...it is only by denying to these Greek islands any shelf at all, outside their 12 mile limit, where they face the Turkish coast or laterally impinge on these high sea corridors, that such areas of Turkish shelf can be maintained."[172]

(g) Conclusion

This dispute, principally turns on the effect to be given to the Greek islands and whether their presence close to the Turkish mainland should prevent access by that country to the Aegean seabed. While the International Court has not yet dealt with a case concerning the continental shelf of islands, it has been noted that in its 1976 judgment the Court seemed to recognize that shelves might be generated by the Greek islands.[173] This conclusion seems also to be supported by customary international law.[174] It would, therefore, seem that unless the parties can come to an agreement on the delimitation of the Aegean seabed by way of restricting the continental shelves of the Greek islands or by creating enclaves, that Greece would be fully entitled under the provisions of customary law and the 1982 Law of the Sea Convention[175] to claim a great deal of the Aegean Sea and thereby restrict Turkey's seabed to the area immediately adjacent to its coastline.

4. THE MARITIME BOUNDARY BETWEEN AUSTRALIA AND INDONESIA

(a) Introduction: The 1970 Agreements

Australia and Indonesia began negotiations in 1971 for the delimitation of their maritime boundary through the Arafura and Timor Seas. In that year an agreement[176] was concluded which provided for the seabed boundary to run through a series of 12 points off the coast of the Indonesian territory of West Irian through to a point in the centre of the Arafura Sea.[177] Agreement was also reached on the boundaries between West Irian and Papua New Guniea, which was at the time a United Nations Trust Territory administered by Australia. Article 3 provided for a point about 20 miles offshore[178] the southern land boundary to connect with the first point in the Australian- Indonesian boundary.[179] In Article 4 provision was made for the extension of the land boundary off the northern coast, it being noted that: "If any lines are drawn extending this line northward, they shall be drawn on the same principle, that is to say the principle of equidistance."[180] Also of note in the Agreement was the provision made for the discovery of mineral deposits such as hydrocarbons or natural gas in the seabed which straddles the agreed boundary-line, in which case: "...the two Governments will seek to reach agreement on the manner in which the accumulation or deposit shall be most effectively exploited and on the equitable sharing of the benefits arising from such exploitation."[181]

In 1972 the two countries negotiated a second Agreement[182] which provided for the extension of the existing sea boundary through the Arafura Sea to a point which lay to the south of the easterly tip of the Portuguese Timor.[183] The boundary line then resumed to the south of the Indonesian/Portuguese land border on Timor, and ran in a southerly direction to a median point between the Indonesian Island of Pulau Roti and Australia's Ashmore Island.[184] The

Agreement, which the parties had noted in a Joint Communique, provided for the division of the seabed in a 'fair and equitable manner'[185], also provided that Australian mining companies who had already begun exploration in the Timor Sea on what was now the Indonesian side of the seabed, could continue to do so under a production sharing agreement with the Indonesian Government.[186] The Agreement also duplicated the 1971 provision for negotiation in the event of the discovery of a mineral deposit adjacent to both countries' seabed.[187]

A third Agreement was signed in 1973 which completed the delimitation of the sea boundary off the southern coast of Papua New Guinea and West Irian.[188] Provision was made for the respective territorial seas and exclusive fishing zones of each country to coincide as far as possible with the delimited seabed boundaries.[189]

(b) Dispute over the 'Timor Trough'

From the review it seems that the three Agreements which were negotiated were done in an orderly fashion with little controversy, but unfortunately the official announcements and decrees give little indication of what was the cause of this rash of boundary delimitation between the two countries. The catalyst for this action was an Australian declaration in 1967 with respect to offshore areas, in which sovereignty was claimed for exploration and exploitation.[190] The declared area in the Timor Sea included all that part of the continental shelf up to the edge of the Timor Trough, the position of the boundary resulting from the Australian opinion that the seabed between Australia and Timor was comprised of two distinct continental shelf areas and that the Trough was the natural dividing line. Yet the Indonesian view was that the Trough was only an accidental depression in the seabed and that there was one complete continental shelf between the two countries which should be delimited on the basis of the equidistance and median line principles.[191]

The Timor Trough has been described as being: "...a deep depression in the sea floor, which has an axis roughly parallel to the south coast of Timor, and between 25 and 50 nautical miles from that coast. The width of the trough is 70 nautical miles in some sections and depths of 1,300 fathoms (2,380 metres) have been recorded."[192] Prescott, after describing the position taken by each country in the negotiations, noted that: "Australian administrators would have been happy either with a boundary drawn along the northern and southern margins of the axis of the Trough. ...Indonesia pressed for a line which lay well south of the axis of the Trough. In view of the existence of Portuguese Timor at that time, the disputed area between Australia and Indonesia consisted of two parts; the part lying west of Portuguese Timor measured 8,100 nautical square miles, while the part to the east measured 12,800 nautical square miles."[193] Eventually Australia was prepared to make concessions, and as a consequence the maritime boundaries to the east of Timor and that to the west of Portuguese Timor which were negotiated in 1972, saw Indonesia gain an area of 3,000 square miles of seabed which had originally been claimed by Australia.[194]

As already noted, there exists a gap in the delimited boundary between the seabed lying opposite Australia and East Timor. During the negotiation of the Australian/Indonesian boundary attempts were made to also negotiate a sea boundary with Portugal, which at the time controlled East Timor, but the Portuguese refused to negotiate until a final Law of the Sea Convention had been adopted.[195] Indonesia invaded East Timor in 1975 and though this led to a great deal of tension between Australia and Indonesia, the Australian Government eventually accorded de facto recognition to the Indonesian annexation and this paved the way for a resumption of boundary delimitation negotiations in 1978.[196]

(c) Opinions on the Status of the Timor Trough

In a scholarly article written by Lumb[197] at a time in which the United Nations Conference on the Law of the Sea was debating the merits of the Informal Composite Negotiating Text,[198] the respective positions of Australia and Indonesia are discussed with respect to how the maritime boundary should be delimited in the area opposite East Timor. He noted that Australia emphasized that a coastal state has inherent sovereign rights over the resources of that part of the seabed which constitutes a natural prolongation of the land mass, and consequently claimed it was freely entitled to exercise jurisdiction over the continental shelf up to the edge of the Timor Trough.[199] Indonesia rejected this view and argued that: "...the natural prolongation criterion only becomes a paramount criterion where a shelf extends beyond 200 miles or in the context of opposite states where (in the absence of special circumstances) the distance between the baselines of the two countries exceeds 400 miles,"[200] and therefore the median line was the only equitable line of delimitation.

Looking at similar cases in which a 'trough' was involved, Lumb referred to the boundary disputes in the East China Sea, the Georges Bank Dispute in the Gulf of Maine, and the Norwegian Trough in the North Sea.[201] Yet the Timor Trough was distinguishable from those cases due to the fact that the intervening maritime space was not affected by the presence of islands, and that the Timor Trough was: "...a discrete feature clearly dividing the continental shelves of two different land masses with no entanglement with 'arcing' or 'enveloping' shelves of either land mass. Its location is of such a nature as to leave the island of Timor with an adequately wide shelf. It is, moreover, much greater in depth than the other troughs and channels."[202]

Finding these cases of no assistance he turned to the various Draft Articles of the I.C.N.T. for guidance, noting that at the time there were three possible sources of the 'law' which could determine this dispute: customary international law, the law contained in the 1958 Law of the Sea Conventions, and the law being formulated by the Law of the Sea Conference.[203] After a review of all the various delimitation techniques and evidence, he concluded that the: "...Timor Trough is a fundamental geomorphological feature of the seabed separating East Timor from Australia. Consequently an appropriate delimitation line in accordance with customary international law based on the doctrine of natural prolongation and the criteria of equity and relevant circumstances would be the middle of the Trough. Insofar as a previous delimitation has delimited a seabed line opposite to East Timor which is located on the Australian continental slope, that previous line is a relevant circumstance in determining a seabed delimitation opposite East Timor."[204]

Australia and Indonesia have also yet to negotiate a fisheries' jurisdiction boundary, a seabed boundary between Christmas Island and Java, and a continuation of the 1972 seabed boundary from the Timor Sea into the Indian Ocean.[205]

(d) Recent Developments

At present, though the state of current negotiations is unclear,[206] certain developments can be noted. At the completion of the second round of negotiations in May 1979, a joint Press Release issued by the parties revealed that little progress had been made up to that time.[207] Two events which gave a greater impetus to the current talks were the declaration by Australia in

November 1979 of a 200 nautical mile Australian Fishing Zone[208], and the proclamation by Indonesia on 21 March 1980 of a 200 nautical mile Exclusive Economic Zone.[209] While Australia explicitly noted in its declaration that in those cases where no boundary had been agreed upon with the opposite or adjacent State who would be affected by the new zone, a median line boundary would apply,[210] Indonesia took exception to the new Australian zone due to the weight that was given to Ashmore and Cartier Islands when drawing the boundary line.[211]

Following the fourth session of boundary negotiations in October 1981, a 'Provisional Fisheries Surveillance and Enforcement Arrangement' was agreed upon, to come into effect on 1 February 1982.[212] This provisional line, which is without prejudice to any permanent fisheries boundary between the two countries, is a significant retreat from the Australian median line claimed in 1979 and gives minimal effect to the presence of Ashmore Island in the disputed waters. The practical effect of the line was that Australian vessels fishing north of the line would require Indonesian licensing to do so, and the same for Indonesian vessels fishing south of the line.[213] Australia showed its willingness to abide by the Provisional Boundary in August 1983, when it declared a National Nature Reserve in the area of Ashmore Reef, which included Ashmore Island, while at the same time noting that: "... the rights of Indonesian fishermen who traditionally use the area will be maintained..."[214]

While the maritime relationship of Australia and Indonesia is that of opposite States, this review has shown that the use of a median or equidistance line is not always the most suitable in such a circumstance. The eventual delimitation of the boundary area known as the 'Timor Gap' will be watched with keen interest by the international community, due to the guidance it may give to other States who have similar seabed features in their disputed continental shelf zones.

5. AUSTRALIA AND PAPUA NEW GUINEA AND THE TORRES STRAIT TREATY

(a) Introduction: History of the Torres Stait Border

During the time that Australia was engaging in maritime boundary negotiations with Indonesia in the early 1970's[215], it was realized that, with the Territory of Papua New Guinea moving towards independence, a maritime boundary would soon have to be delimited through the Torres Strait, the stretch of water separating Papua New Guinea from the Australian continent. Politicians in Papua New Guinea also realized that it was of vital necessity for the new country to resolve any boundary dispute it had with its 'parent' nation, otherwise its initial formative years could be plagued by the uncertain status of its international boundary.

In a speech to the Papua New Guinea House of Assembly in December 1974, the Minister for Foreign Relations, Sir Albert Maori Kiki, expressed his concern over the boundary between Papua New Guinea and the Australian State of Queensland, noting that: "...in places the line comes within a couple of hundred yards of the Papuan coastline - a situation which, as a Queensland Premier put it, is 'absurd', especially when the Queensland coastline is one hundred miles across the Strait."[216] Calling for the negotiation of a new boundary line and the recognition of the traditional rights of the Papuans who lived on the mainland and offshore islands, the Foreign Minister acknowledged that the rights of the Torres Strait Islanders, who are Australian citizens, would also have to be respected. He concluded by noting that: "...natural justice demands some degree of equality in the sharing of the natural resources of the area between the two countries."[217]

The boundary problem alluded to by Kiki arose from the granting to the colony of Queensland of the offshore islands in the Torres Strait to a distance of 60 miles through a series of letters patent in the nineteenth century.[218] "The effect of this development was that by August 1879 the territory of the Colony of Queensland, and subsequently the territory of Australia was extended as far northward as possible without Queensland attempting to annex part of the Island of Papua-New Guinea itself. What had been established was a situation under which the territory of the Colony of Queensland included islands from which at low tide it was possible for the inhabitants of the Colony of Queensland to wade across a shallow channel to mainland Papua-New Guinea and vice versa. Furthermore, it became impossible for any shipping or maritime traffic of any significant draught to pass along the southern coast of New Guinea without coming within waters which Queensland claimed were its territorial waters."[219]

(b) Proposals to resolve the Boundary issue

Various proposals were put forward to solve the border problems before Papua New Guinea achieved independence. Suggestions were made that the Australian and Queensland border be moved to the south by the cession of territory to Papua New Guinea, or that the native peoples of the Torres Strait could be moulded into a new State or Territory of Australia, or if agreement could not be reached by negotiation then the matter could be determined by the International Court of Justice.[220] The problems faced by the Australian Government in reaching an acceptable legal and political resolution of the border issue were outlined to Parliament by the Australian Prime Minister, Mr. Whitlam, in October 1975 when he noted the hostility of the Queensland Government and the Torres Strait islanders to any suggestion of a redrawing of the boundary line.[221]

(c) The beginning of serious Negotiations

With a change of Government in Australia in 1975, progress was made in the boundary negotiations so that by June 1976 the Foreign Ministers of both countries were able to issue a joint statement which outlined those points on which agreement had been reached.[222] These included the establishment of a seabed boundary which ran to the south of the present international boundary, Australia retaining sovereignty over all inhabited islands in the Torres Strait, the Australian islands which lay to the north of the seabed line only having a territorial sea of three miles, and the establishment of a zone in the Torres Strait which would preserve the traditional way of life of the inhabitants of the Torres Strait and adjacent coast of Papua New Guinea.[223]

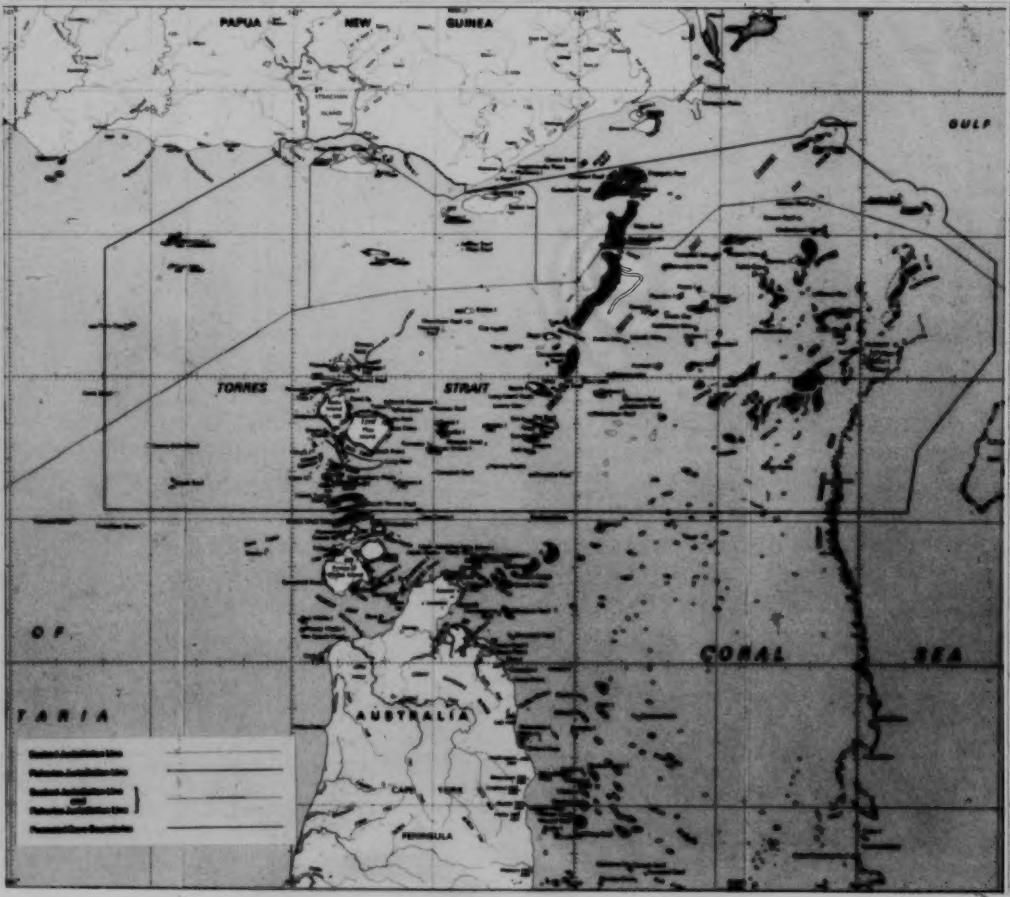
Though negotiations were suspended in 1977, they received an impetus with the announcement by Andrew Peacock, Australian Minister for Foreign Affairs, in March 1978 that Australia was prepared to concede to Papua New Guinea the islands of Kawa, Mata Kawa and Kussa after historical research had shown that the islands had never originally been granted to the Colony of Queensland in the nineteenth century.[224] Though some commentators have called into doubt the basis of this about-face by Australia with respect to the sovereignty of these three islands,[225] the statement did lead to an increase in negotiations so that the Torres Strait Treaty was able to be drafted and eventually signed on 18 December 1978.[226] Despite the speed with which the final provisions of the Treaty were negotiated, it was not until October 1983 that the Australian Government was able to introduce the necessary amending legislation to bring into effect the Treaty provisions.[227] Both Queensland and Papua New Guinea Parliaments are also expected to introduce amending legislation in the near future[228] and as a consequence of this it is hoped that the Treaty will be ratified soon.[229]

(d) The provisions of the Torres Strait Treaty

Turning to the actual provisions of the Treaty, the seabed boundary runs in the west from the already delimited boundary between Australia and Indonesia[230] in a north-easterly direction to the Torres Strait where it passes to the north of Cape York Peninsula and the main group of Torres Strait Islands, but to the south of 15 islands and cays which are recognized as Australian, and then continuing in a south-easterly direction into the Coral Sea, terminating at a point equidistant from the Papua New Guinea Island of Pocklington Reef and Australia's Mellish Reef.[231] Article 1(1)(i) of the Treaty defines 'seabed jurisdiction' as "sovereign rights over the continental shelf in accordance with international law, and includes jurisdiction over low-tide elevations, and the right to exercise such jurisdiction in respect of those elevations, in accordance with international law." The fisheries jurisdiction line follows the seabed line except for a 48 mile stretch where it deviates to the far north so that it encloses an area bounded by the Australian territory of Abusi Island to the west and Saibai Island to the east.[232] Fisheries juridiction has been defined in Article 1(1)(b) of the Treaty as: "sovereign rights for the purpose of exploring and exploiting, conserving and managing fisheries resources other than sedentary resources."

With respect to those Australian islands which lie to the north of the seabed line, Australian sovereignty is explicitly recognized in Article 2[233], as is Papua New Guinea's sovereignty over the three islands which Australia had previously believed fell under its control.[234] All of those Australian islands which are north of the seabed jurisdiction line have territorial seas of only three miles,[235] while a delimited territorial sea boundary with Papua New Guinea is provided for the six Australian islands which lie close to the mainland.[236] As a consequence of the recognition of Australian sovereignty over certain islands north of the seabed jurisdiction line, enclaves have been created within an area of Papua New Guinea jurisdiction, yet none of those islands has a recognized continental shelf. Also, because of the extension of Australian fisheries jurisdiction into an area of Papua New Guinea seabed jurisdiction, a situation arises where joint jurisdiction is being exercised for different purposes. To prevent any future disputes in this area, the Treaty specifically provides that neither party is to exercise residual jurisdiction in the area without having first consulted the

FIGURE 5


PAPUA
NEW
GUINEA
GULF
TORRES
STRAIT
OF
CORAL
SEA
TARIA
AUSTRALIA
CAPE
YORK
PENINSULA

The islands whose names are underlined represent those over which Australian sovereignty has been recognized by Article 2(1)(a) of the Torres Strait Treaty other party.[237]

A unique feature of the Treaty is the establishment of a protected zone,[238] the purpose of which is to: "...acknowledge and protect the traditional way of life and livelihood of the traditional inhabitants including their territorial fishing and free movement."[239] This protected zone includes the three islands which were recognized as belonging to Papua New Guinea, all the Australian islands north of the seabed jurisdiction line, and the main Australian islands south of the line, except for those islands in the Thursday Island group just to the north of Cape York.[240] The Treaty provides that in the Protected Zone there shall be free movement of traditional activities such as fishing,[241] protection of the marine environment[242], protection of fauna and flora[243], and also the sharing of the catch of commercial fisheries in the zone on a percentage basis depending on what side of the boundary line the catch is taken.[244] Finally, a moratorium is imposed on all mining or drilling of the seabed in the Protected Zone for a period of ten years from the date of entry into force of the Treaty.[245]

(e) Analysis of the Treaty

As can be seen from the above discussion, the Treaty is very comprehensive and covers a number of matters which up to that time had not usually been the subject of maritime boundary agreements. Of significance are the rights which Australia waived with respect to the territorial sea, continental shelf, and fisheries zone of those islands which lie to the north of the seabed jurisdiction line. Prescott has calculated that Australia conceded: "...its claim to 8,800 square nautical miles of seabed; to total fishing rights in 5,650 square nautical miles of sea; to 75 percent of the fishing rights in 2,170 square nautical miles of water; and to three islands which had been considered to be part of Australia for ninety-nine years."[246] Yet the Treaty had a great deal of support in Australia despite those concessions, it being reported by a Parliamentary committee that: "...the Treaty is equitable to both countries, has regard to the interests of the parties most immediately affected, and is apparently supported by all interested parties."[247]

Of the commentators who have studied the Treaty, Harry has noted that a strict median line principle was not adopted in the drawing of the seabed line, in that the Australian islands close to the shore of Papua New Guinea were ignored while the larger Australian islands in the Torres Strait were recognized, and as a consequence what exists is a modified median line.[248] He concluded that: "An analysis of the line indicates that it conforms with the basic principles of international law applicable to delimitation. From the point of view of proportionality, the line achieves a reasonable balance between the rights of Papua New Guinea, based on its mainline coast, and the rights of Australia, based on its ownership of numerous islands scattered throughout the Strait. If every island were given a 12 mile territorial sea, the Strait would be transferred into an area of Australian sovereignty. This was not done, instead while Australia retains jurisdiction over a significant proportion of the seabed, Papua New Guinea is given jurisdiction over a significant area of seabed in the north of the Strait. Apart from ensuring a reasonable degree of proportionality, the line is essentially a modified median line. The reasons for its modification are not difficult to perceive. The geographical characteristics of the area make a pure median line inappropriate."[249]

Lumb emphasized that the delimited seabed line is one based on the principles of equity and proportionality[250], but that while this case is similar to the Anglo-French Arbitration[251] in its recognition of enclaves, it can also be distinguished due to the fact that the seabed line is a greatly modified median line, that the uninhabited Australian islands have only a three-mile territorial sea, and that the fisheries jurisdiction line diverges from the seabed line to account for certain inhabited Australian islands.[252] Others have concluded that while the Treaty is complex: "...it was vital that so far as possible precise legal rules should be settled to regulate the claims of the two countries in the Torres Strait. Anything less would have only left room for continuing dispute and perhaps would have fomented discord between the two countries which the Treaty is designed principally to end."[253]

The Torres Strait Treaty and the special recognition it gives to the traditional inhabitants of the Torres Strait Islands and the coastal population of Papua New Guinea may provide a model for future maritime boundary delimitations. It will be of interest to see whether other coastal States adopt a similar approach to Australia and Papua New Guinea.

6. CHINA'S MARITIME BOUNDARIES

(a) Introduction

One area of the world which is plagued by numerous unresolved maritime boundary disputes is that part of Asia which fronts the Pacific Ocean. This area can roughly be divided into two regions, South-East Asia, and that part of the continent which is dominated by the People's Republic of China.[254] In the South-East Asian region, an area which is geographically dominated by the island archipelagoes of Indonesia and the Philippines, maritime boundary disputes do exist, but many bi-lateral and multi-lateral treaties have already been agreed upon to delimit the numerous maritime boundaries between the mainland and island States.[255] Consequently it is the delimitation of the continental shelf in the Yellow, East China and South China Seas which pose the greatest interest due to the presence of China in the region and the promise of considerable mineral resources in the seabed.[256]

(b) The Yellow and East China Sea Continental Shelf

The mineral resources of the continental shelf[257] of all these seas are eagerly sought by China, the Republic of Korea[258], Japan, and the Republic of China,[259] it having been noted regarding the physical features of the Chinese Continental Shelf, that: "China's continental shelf is considered to be one of the most extensive in the world. In the Bohai Gulf and the Yellow Sea, the continental shelf extends to the entire sea area. The continental shelf of the Bohai Gulf totals 83,000 sq. km. and that of the Yellow Sea 404.000 sq. km. measured out to the 200 metre isobath. In the East China Sea the shelf covers most of the sea area totalling about 1,059,000 sq. km. and only the South China Sea has a narrower continental shelf of 728,000 sq. km., all measured out to the 200 metre isobath."[260] With all of this adjacent seabed possibly containing some of the largest untapped mineral resources in the world, there has been a great anxiety to encourage exploration and exploitation of the area, yet due to the uncertain status of the claims made to the seabed by the adjacent coastal States, development has been slow. It would seem that any future resolution of this problem hinges on the attitude of China and whether she is prepared to negotiate seabed boundary agreements.

(c) China's maritime boundary policy

With the formal recognition by the international community of Taiwan as the only legitimate representative of 'China' during the formative years of the 'new' law of the sea, it was not until the convening of the Third United Nations Conference on the Law of the Sea that China had an opportunity to voice its opinion on the issue of the continental shelf and its delimitation.[261] The first real indication of Chinese policy came by way of a working paper[262] which was presented to a pre-Conference sub-committee dealing with the issue of the continental shelf. The paper noted: "By virtue of the principle that the continental shelf is the natural prolongation of the continental territory, a coastal State may reasonably define according to its specific geographical conditions, the limits of the continental shelf under its exclusive jurisdiction beyond its territorial sea or economic zone. The maximum limits of such continental shelf may be determined among States through consultations."[263] Concerning the issue of delimitation between States of the continental shelf, the working paper noted: "States adjacent or opposite to each other, the continental shelves of which connect each other, shall, on the basis of safeguarding and respecting the sovereignty of each other, conduct necessary consultations to work out reasonable solutions for the exploration, regulation and other matters relating to the natural resources in their contiguous parts of the continental shelves."[264]

As a consequence of these 1973 submissions, commentators have been able to pinpoint four features of China's continental shelf policy: "1. China is in favour of the natural-prolongation-of-land-territory theory advanced by the International Court of Justice in the North Sea Continental Shelf cases. 2. China maintains that a coastal state has the right to exercise its sovereign discretion in setting reasonable limits on its continental shelf. 3. China recognizes the necessity of setting maximum limits of the continental shelf claimed and such limits may be greater than the 200 mile economic zone if its geographical conditions warrant such an extension. 4. The maximum limits of the continental shelf are to be determined through negotiations. No decision has been made, however, on how these limits are to be determined, such as by depth, distance or exploitability."[265]

(d) The Maritime boundary delimitation problems

(i) North Korea

The maritime boundaries that China will eventually have to delimit will now be discussed. China's boundary with the Democratic People's Republic of Korea[266] which is in that part of the Yellow Sea known as Korea Bay, is characterized by a North Korean claim to a 50 mile offshore Military Boundary Zone[267] and an Exclusive Economic Zone.[268] These zones have only been extended as far as a median line with China, and though both countries support the delimitation of boundaries through consultation, any negotiations which take place may be stalled due to China's support of the natural prolongation of the seabed theory and North Korea's acceptance of the median line principle.[269]

(ii) South Korea

In the southern Yellow Sea, China's offshore area is opposite South Korea, and again a conflict in delimitation principles exists as the South Korean's favour a median line approach.[270] Though the Chinese may continue to pursue their natural prolongation approach in this area it will be a difficult argument to sustain in this part of the Yellow Sea as apart from the Okinawa Trough, the depth of the sea does not exceed 200 metres and the seabed is in fact one continuous continental shelf.[271] The other geographical feature of note in this area is the presence of numerous offshore islands, yet because of their close proximity to both coasts they are not likely to cause great difficulties in any eventual boundary agreement,[272] which it has been suggested should be based exclusively on the median line principle.[273] It has been argued that the biggest problem facing any future seabed boundary between China and South Korea is the political differences between the two States, and that until such time as the two Koreas are reunified the boundary issue is unlikely to be resolved.[274]

Due to the deadlock on the boundary between China and South Korea, Japan and South Korea took action in 1974 to delimit their respective maritime boundaries.[275] Two treaties were drawn up, the first[276] to delimit the northern boundary from the Sea of Japan through the Korea Strait, such being an equidistance line which gave effect to the Japanese island of Tsushima,[277] while further to the south the parties agreed upon a Joint Development Zone,[278] which in no way affects the status of the various disputed islands and islets in the region and does not prejudice the parties' future claims in the delimitation of the continental shelf.[279] These treaties came into effect in June 1978 and exploration began in late 1979.[280]

(iii) Japan

With respect to China's maritime boundary in the East China Sea with Japan, this gives rise to the issue of the extent of Japan's continental shelf claim off the Ryukyu Islands and also the ownership of the uninhabited islands in the Senkaku group. In the case of the Ryukyu Islands, the delimitation of the seabed is complicated by the Okinawa Trough, which lies between the islands and the Chinese mainland. The legal issue which arises due to the position of the Okinawa Trough, is whether the Ryukyu Islands lie on the same seabed which stretches from the Chinese mainland or whether the Trough is such a depression in the seabed that it is a natural break which creates two distinct continental shelves on either side of it. If it is the former, the median/equidistance line test would apply to Japan's benefit, if it is the latter, then China could argue that on the basis of the natural prolongation test that its continental shelf stretches right up to the western edge of the Okinawa Trough.[281]

With respect to the Senkaku Islands, a territorial dispute over the ownership of the islands broke out in 1970

The material on page 186 has been removed due to the unavailability of copyright permission. The material is a map showing the location of the 200 metre isobath line in the East China Sea, with special reference to the position of the Okinawa Trough. The source of this material is: Allen and Mitchell, The Legal Status of the Continental Shelf of the East China Sea, 51(1971-1972) Oregon Law Review, 789 at 790.

between Japan and Taiwan after the latter granted an oil concession contract for an area which included the islands.[282] Apart from the arguments based on previous occupation and control, emphasis has also been placed on geography, international law and geology.[283] The dispute has now evolved into one between China and Japan, it being noted that: "As the dispute involves not only potential oil but also ownership of territory, it becomes even more difficult for either side to compromise its claims simply in the interest of negotiated settlement, because, for historical reasons, national feelings run high over territorial issues in East Asian Countries, and such issues are often regarded as too important to be negotiated."[284] Until the sovereignty of the islands is settled there will be no boundary agreement in the East China Sea, though Yuan has suggested that a joint development project may be opted for in the interim period.[285] Yet he cautions that: "A precipitous resolution of territorial disputes is not in China's best interest, because any compromise would set a dangerous precedent for other territorial claims in the region."[286]

(iv) The South China Sea

In the South China Sea, the seabed boundaries in the region are complicated by conflicting claims to over 200 islands. China is especially involved in the claims to the Paracel Islands, which have been under Chinese control since 1974, and the Sparatly Islands, which China claims on the basis of long historical use by Chinese fishermen. In the case of the Paracel Islands, Vietnam also has lodged a claim, while the Philippines, Taiwan and Vietnam also lay claim to the Sparatly islands.[287] Once again, until such time as these island disputes are settled there is little hope of any negotiated boundary settlements in the region.

With respect to the Chinese-Vietnamese seabed boundary in the Gulf of Tonkin, delimitation is made easier by the whole area being within the 200 metre contour line and there being no disputed islands in the Gulf. Yet a disagreement has arisen over the 1887 Sino-French Treaty[288] which the Vietnamese argue delimited the seabed boundary, while the Chinese position is that the matter is still unresolved.[289] To complicate matters the Vietnamese have already awarded exploration contracts to foreign firms in the area between the Mekong Delta and the Sparatly Islands, while the Chinese granted seismic survey contracts in 1979 to foreign corporations to explore in the Gulf.[290] Opinion is mixed as to what may occur in the region in the future,[291] but with the Soviet Union attempting to extend its influence in Vietnam, it is certain that the maritime boundary dispute will be more clouded in political rather than legal debate.

(e) Conclusion: The interplay of politics and international law

From the above discussion it can be seen that political as well as legal considerations play an important role in the boundary disputes discussed above, and central to this are the disputes over the sovereignty of several islands. Consequently various commentators doubt if there will be a swift resolution of the disputes. Park notes that the historical importance of land in Asia, the modern importance of oil and gas, the various national security interests of the parties, and also the presence of extraregional powers in the area, all work against the successful delimitation of maritime boundaries.[292] The recent promulgation of China's Offshore Petroleum Resources Regulations may provide an impetus for further boundary negotiations, but as of yet it is too early to determine if this will be so.[293]

What can be concluded is that China is a firm supporter of the natural prolongation of the continental shelf test as propounded by the International Court in the North Sea Continental Shelf Case.[294] It should, therefore, be noted that the Chinese favoured the inclusion of a clause in the 1982 Law of the Sea Convention which provided: "The delimitation of the continental shelf between states with opposite or adjacent coasts should be effected through agreement under the guiding principle of natural prolongation and in accordance with equitable principles, taking into account all relevant circumstances."[295] While this principle is not uniformly accepted among the Asian nations, there is the possibility that progress could be made in the exploitation of the disputed seabed areas by way of joint development plans,[296] but this would depend on the political relations between the parties.

Of great significance to the disputing parties may be the decision of the International Court in the Gulf of Maine dispute between Canada and the United States. With conflicting claims in this case based on the use of the equidistance principle in contrast to delimitation based on natural prolongation and equitable principles, a definite judgment by the Court coming down in support of one of these delimitation theories could lead to a softening of attitude by some of the parties in the Asian maritime boundary disputes. Until that time, it seems that China will have to content itself with near-shore seabed exploration.[297]

7. THE TUNISIAN-LIBYAN CONTINENTAL SHELF CASE

(a) Introduction

In 1982 the International Court of Justice decided on the continental shelf boundary between Tunisia and Libya[298] and in so doing gave an indication of the current state of the law of maritime boundary delimitation following the 1969 North Sea Continental Shelf Cases,[299] the 1977 Anglo-French Arbitration[300] and the developments which were at that time taking place at the Third United Nations Conference on the Law of the Sea.[301] This dispute arose after Libya in 1968 granted a mining concession in the Mediterranean Sea which abutted onto an area similarly claimed by Tunisia.[302] Negotiations were commenced between the parties and were carried on till 1977[303] when a Special

Agreement[304] was concluded in which the dispute was submitted to the International Court of Justice

(b) The Facts

The land boundary between Tunisia and Libya[305] meets the sea at Ras Ajdir on the Mediterranean coastline. To the north-west of this border, the Tunisian coastline curves into an area known as the Gulf of Gabes, from where it turns to the north-east and bulges back out into the sea, of which Ras Kaboudia is the most easterly point. The island of Jerba is situated off the Tunisian coast not far to the north-west of the land frontier, while the Kerkennah Island group lies in the north-east part of the Gulf of Gabes, opposite the town of Sfax. The Libyan coastline is relatively smooth with no outstanding features in its south-west progression to the city of Tripoli[306]

Tunisia began granting offshore oil concessions in 1964, and Libya followed in 1968[307], at which time this dispute arose. During the following years both parties were careful not to infringe upon the other's immediately adjacent seabed when granting mining concessions, and as a consequence most of the licenses granted only covered areas of the seabed immediately opposite each State's coastline.[308]

The 1977 Special Agreement between the parties provided the Court with two questions to resolve. The first was: "What are the principles and rules of international law which may be applied for the delimitation of the area of the continental shelf appertaining to the Republic of Tunisia and the area of the continental shelf appertaining to the Socialist People's Libyan Arab Jamahiriya and, in rendering its decision, to take account of equitable principles and the relevant circumstances which characterize the area, as well as the recent trends admitted at the Third Conference on the Law of the Sea."[309] A dispute existed between the parties regarding the second question and how accurately the Court should delimit the boundary, with Tunisia requesting a delimitation which would show precisely the practical way of applying the Court's judgment[310], while Libya sought only a clarification of the practical methods of applying the delimitation principles in this specific case.[311] The Court found no substantial distinction between the differing requests, noting that irrespective of the Libyan request its decision had to be precise.[312]

(c) Memorials presented by the Parties

In the Memorials presented by the parties, Tunisia requested that each party be granted the natural prolongation of its continental shelf[313], that the delimitation should not encroach upon Tunisia's historic rights[314], and that consideration be given to the physical and geological structure of the seabed[315] and the irregularities of the Tunisian coast.[316] The Libyan Memorial emphasized the concept of the natural prolongation of the land territory into the sea[317], that the delimitation be in accordance with equitable principles[318] and that the principle of equidistance was not an obligatory method of delimitation.[319]

(d) Judgment of the Court

(i) The Factors to Consider

In the Court's judgment, consideration was first given to the submission that it refer to 'trends' in maritime delimitation which had become acceptable at the Third United Nations Conference on the Law of the Sea.[320] While the Court noted that the term 'trends' was vague, it accepted that it could not ignore any emerging 'trends' from the Conference if these embodied or crystallized any pre-existing or emergent rules of customary law.[321] With respect to the concept of natural prolongation, the court considered the submission of both parties regarding the geological makeup of the adjacent seabed and the relationship of the land mass with the continental shelf.[322] Referring to the emphasis given to the natural prolongation criterion by the Court in the North Sea Continental Shelf Cases[323] the Court reaffirmed that a delimitation had to be based on equitable principles, noting that, the: "...identification of natural prolongation may, where the geographical circumstances are appropriate, have an important role to play in defining an equitable delimitation, in view of its significance as the justification of continental shelf rights in some cases; but the two considerations - the satisfying of equitable principles and the identification of the natural prolongation - are not to be placed on a plane of equality."324

After further consideration of submissions based on geomorphology and bathometry325 the Court concluded that none of the arguments or evidence presented before it were sufficient to prove: "...such a marked disruption or discontinuance of the seabed as to constitute an indisputable indication of the limits of two separate continental shelves, or two separate natural prolongations."326 Consequently the Court concluded that since both Libya and Tunisia derived title to the adjacent continental shelf by virtue of a natural prolongation of their individual land masses into a common seabed, the natural prolongation test was of no assistance in this case and other criteria would have to be adopted for the delimitation process.327

Acknowledging the importance the parties had placed on the need for a delimitation to be based on equitable principles, and the emphasis given to this principle in the North Sea Continental Shelf Cases, the Court went on to canvass which delimitation principles it should consider in this case, noting that: "The principles to be indicated by the Court have to be selected according to their appropriateness for reaching an equitable result. From this consideration it follows that the term 'equitable principles' cannot be interpreted in the abstract: it refers back to the principles and rules which may be appropriate in order to achieve an equitable result."[328] Noting that it was virtually impossible to achieve an equitable delimitation without taking into account the circumstances of each particular case[329], the Court considered the coastlines of each of the parties.[330] After having decided that the relevant portions of the coastline were from Ras Kaboudia on the Tunisian coast to Ras Tajoura on the Libyan coast[331] reference was made to the northward trend of the Tunisian coastline,[332] and the islands which lay off that coast[333], the land frontier,[334] and the various lines of delimitation proposed by the parties[335], as all being significant factors in this case. The Court also gave emphasis to a perpendicular line running from the land frontier which the previous colonial powers in the region had adhered to[336], and to a 'de facto' boundary line which had resulted from the manner in which the parties had initially granted oil concession contracts in the area.[337]

Submissions made by Tunisia based on the concept of historic title to the adjacent seabed[338] and on the economic inequality which existed between the parties[339], were held to be of little relevance in this case.[340] With respect to the status of the equidistance principle, the Court noted: "Treaty practice, as well as the history of Article 83 of the draft convention on the Law of the Sea, leads to the conclusion that equidistance may be applied if it leads to an equitable solution, if not, other methods should be employed."[341] The Court did not accept that as a first step it had to examine the effects of a delimitation based on the equidistance principle, commenting that: "...equidistance is not, in the view of the Court, either a mandatory legal principle, or a method having some privileged status in relation to other methods."[342]

(ii) The Boundary Delimited by the Court

After having concluded that due to the particular coastal features in this case, it would be appropriate to delimit the boundary in two stages[343], the Court first considered that portion of the boundary which was immediately adjacent to the land frontier. The Court noted that it was entitled to consider as relevant factors, those indications which existed as to how the parties had considered the boundary should be drawn[344], the de facto boundary which existed as a consequence of oil concessions granted by the parties[345] and the 26° line previously adhered to by France and Italy for the delimitation of their fishery zones.[346] Consequently the Court decided to extend the 26° line into the sea at an angle corresponding to the Tunisian and Libyan oil concessions,[347] after having noted that a boundary running at a perpendicular from the general direction of the coast was a relevant delimitation criterion.[348]

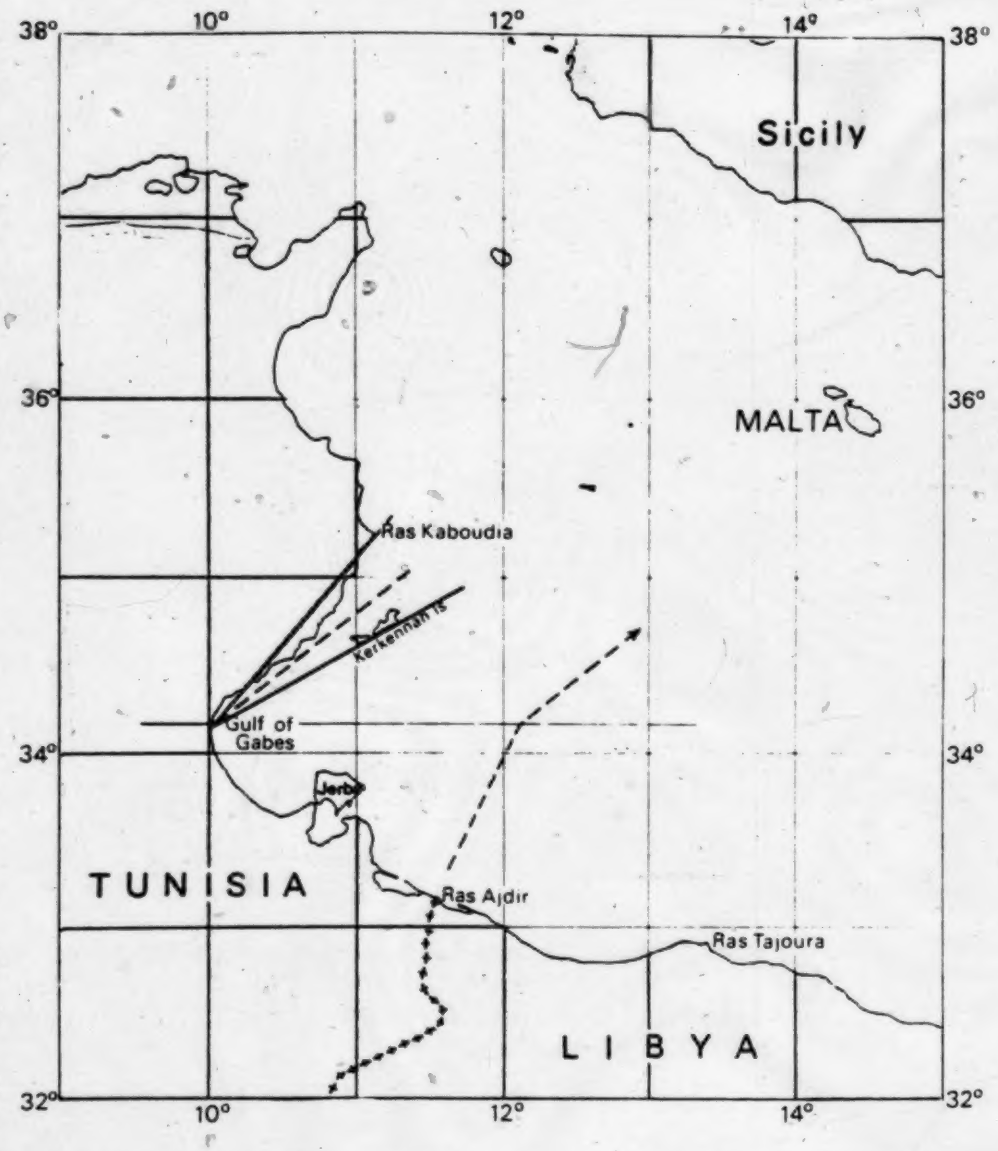
The Court held that the second sector of the boundary had to give effect to the Gulf of Gabes and the Kerkennah Islands, and decided that the boundary should run at a parallel to a 'half-effect' line which was the bisector of a line drawn from the most westerly point in the Gulf to Ras Kaboudia and a line drawn from the same point to the outer edge of the Kerkennah Islands.[349]

Finally the Court applied the proportionality test to the delimited area, noting that the essential aspect of this criterion was to: "...compare like with like, the exact method of drawing the outer boundaries is not critical, provided the same approach is adopted to each of the two coasts."[350] It was found that the ratio which would result from the delimitation of the seabed was 40:60 in Tunisia's favour, and when compared to the relative coastlines of the parties, which was set at 31:69[351] this was sufficient to meet the test of proportionality. The Court concluded its judgment by noting that: "...each continental shelf case in dispute should be considered and judged on its own merits, having regard to its particular circumstances; therefore, no attempt should be made here to overconceptualize the application of the principles and rules relating to the continental shelf."[352]

(e) Opinions of Other Judges

Considering that three of the ten majority judges[353] wrote separate opinions and that four judges dissented[354], it is of interest to consider some of the points made in these separate judgments. Of major concern to the dissenting judges was the attitude of the majority towards the equidistance principle. After accepting that

FIGURE 7


38°
10°
12°
14°
38°
Sicily
36°
MALTA
36°
Ras Kaboudia
Kerkennah Is
Gulf of Gabes
34°
34°
Jerba
TUNISIA
Ras Ajdir
Ras Tajoura
LIBYA
32°
10°
12°
14°
32°

Map showing the two sectors delimited by the International Court. The first ran to a point in the line of latitude which passed through the Gulf of Gabes, while the second ran parallel to a line which gave half-effect to the Kerkennah Islands. The half-effect line was the bisector of a line drawn from the Gulf of Gabes to Ras Kaboudia and from the Gulf of Gabes to the Kerkennah Islands.

equidistance should not hold the status of the only rule of delimitation, Judge Gross noted: "If the Court stated in 1969 that the concurrent use of various methods could, in certain situations, enable the desired equitable solution to be achieved, there was, precisely, all the more necessity to try several methods, certainly including equidistance in the sector close to the coast and farther out, to compare their effects, to investigate whether disproportionate effects resulted from this, that or the other relevant geographical feature, to weight the equities and only to decide in full possession of the facts. This was not done, and this lack of a systematic search for the equitable has produced a result the equity of which remains to be proved."[355] Two of the dissenting judges concluded that the decision seemed to be one based on the principle of 'ex aequo et bono' rather than on the true equities of the case.[356]

The second major point which concerned some of these judges was the decision by the Court to apply the 'half-effect' test to the Kerkennah Islands. In a separate opinion, Judge Schwebel of the majority argued that the Court had failed to show why giving full effect to these islands would have resulted in them having an 'excessive weight' in the delimitation process, noting that: "The Kerkennahs are substantial islands, close to the Tunisian mainland, divided from it by shallow waters in whose banks fisheries are fixed; the considerable population has an ancient and substantial fishing and maritime tradition."[357]

(f) Analysis of the Decision

In a recent analysis of the case, Feldman noted that the principles of delimitation which were evident in the judgment were (1) the general rule that delimitation is to be effected in accordance with equitable principles, taking into account all relevant circumstances, (2) that an equitable delimitation will respect the principle of the natural prolongation and the general geographic relationship of the coasts of the parties, and it will not encroach upon each parties' adjacent shelf or waters, (3) the equitable character of the delimitation will be tested by proportionality, (4) and that the Court will give weight to the prior conduct of the parties in the disputed area.[358] While Feldman also criticized the Court for their comments on the natural prolongation principle,[359] another commentator noted that: "Considering state practice, the limitations of the I.C.J. or any other tribunal in considering complex scientific evidence, the trend toward a distance criteria for continental shelf extension and sovereignty, and the unlikelihood that any situation will arise involving an 'indisputable' natural prolongation, it appears that natural prolongation, while remaining the fundamental basis for claiming title to the shelf, will be of little relevance as a criterion for delimitation."[360]

The Court has also been criticized for the weight it gave to the previous practice of the parties when it delimited the first sector of the boundary, it being argued that such could lead to a reluctance among the disputing parties to seek an interim settlement of the dispute pending final adjudiciation.[361] On the Court's use of the half-effect test it has been noted that: "The Court did not sufficiently distinguish whether the relevant factors in determining the weight given to the islands were the land area, the demography, the distance from the shore, the economic significance, the disproportionate effect the islands have on the direction of the boundary or only their position and low tide areas."[362]

This case is of tremendous significance, not only because it is the first judgment on maritime boundary delimitation given by the International Court since its decision in the North Sea Continental Shelf Cases,[363] but also because of its clarification of some of the principles discussed in that case, the use of the 'half-effect' test for offshore islands, and the acknowledgement of the impact of the Third United Nations Conference on the Law of the Sea.

8. MARITIME BOUNDARY DISPUTES BETWEEN CANADA AND THE UNITED STATES

(a) Introduction

With the recognition of the Exclusive Economic Zone and extended continental shelf by both customary law and the 1982 Law of the Sea Convention,[364] Canada and the United States are faced with the delimitation of their extended offshore boundaries in the Gulf of Maine on the east coast, the Straits of Juan de Fuca and Dixon Entrance on the west coast, and the boundary between Alaska and Canada in the Beaufort Sea.[365] Currently the Gulf of Maine dispute is being argued before a Special Chamber of the International Court of Justice[366] and until a decision is handed down, all other delimitation negotiations have been suspended. The decision by the Court[367] may, therefore, set the standard for any future boundary agreements between these two countries and consequently the history of the dispute and the arguments put forward by both sides will be canvassed, with also a brief look at the other disputes between Canada and the United States. Consideration will also be given to the individual agreements each country has come to with their other maritime neighbours.

(b) The Gulf of Maine Dispute

(i) The Characteristics of the Dispute

As noted,[368] the United States and Canada had previously delimited the boundary through the islands in Passamaquoddy Bay and part way into the Bay of Fundy in 1925, but had taken no steps to extend the boundary out through the Gulf of Maine into the Atlantic Ocean until this current dispute arose. The significant factors of this particular dispute are the geographical features of the coastline and seabed, and the economic importance of the Georges Bank fishing grounds and its potential for rich mineral deposits. While the two countries are adjacent

States in Passamaquoddy Bay they become opposite States as the waters of the Bay of Fundy between Nova Scotia and Maine merge into the Gulf of Maine, at which point Cape Sable Island in Nova Scotia is opposite Nantuckett Island in Massachusetts.

The Georges Bank is a wide shallow extension of the continental land mass which extends to the far eastern edge of the continental shelf and lies offshore the American coastline and to the south of Nova Scotia. It is indented by a depression known as the 'Northeast Channel' which runs as far west as the outer limits of the Gulf of Maine.[369] At the time the dispute arose in the 1960's the area had been subject to extensive fishing by the United States[370] and had also been the subject of several oil exploration permits issued by Canada.[375]

(ii) The Dispute over the Georges Bank Fisheries

The dispute publicly flared up in 1970 after Canada ratified the 1958 Convention on the Continental Shelf,[372] at which time it lodged a declaration with respect to Article 1, which stated: "In the view of the Canadian Government the presence of an accidental feature such as a depression or a channel in a submerged area should not be regarded as constituting an interruption in the natural prolongation of the land territory of the coastal state into and under the sea."[373] It has been noted[374] that the content of this declaration and the manner in which it was lodged, which was later subject to an objection by the

United States,[375] showed the anxiety of the Canadian Government to accept the delimitation principles laid down in Article 6 before the boundary in the Gulf of Maine became a matter of public dispute between the two countries. This was exactly what occurred on February 12, when the U.S. Department of State served public notice that: "...the U.S. Government has refrained from authorizing geologic exploration or mineral exploitation in the areas of the Georges Bank continental shelf. Pending agreement on the delimitation of the continental shelf in the Gulf of Maine, the U.S. Government does not acquiesce in or recognize the validity of permits or other authorizations issued by the Government of Canada to explore or exploit the natural resources of any part of the Georges Bank continental shelf, and reserves its right and those of its nationals in that area."[376]

(iii) The early Negotiations

During the next few years negotiations took place between the parties on three occasions,[377] but it was not until Canada decided in 1976 to extend its fishing zone to 200 miles[378] that both sides seriously began to once again disagree over the delimitation of the boundary. Responding to the proposed Canadian boundary through the Gulf of Maine, which was based on the equidistance principle and allocated the north-east portion of the Georges Bank to Canada[379], the United States published co-ordinates delimiting its proposed boundary in the Gulf in which Canada was allocated no part of the Georges Bank and was acknowledged as only having access to the seabed north of the Northeast Channel.[380] A small area in the middle of the Gulf was unclaimed due to the cross-over of the proposed boundary lines, but the United States declared that it would exercise jurisdiction over this area until such time as the dispute was resolved.[381]

A few days prior to these new U.S. Fishing Zones becoming effective in March 1977, the parties announced the signing of a Reciprocal Fisheries Agreement so as to allow for the continuation of fishing by the fishermen of both countries until such time as the dispute was finally resolved.[382] A note published by the Canadian Department of External Affairs, not long after this Agreement, became one of the first occasions in which the respective legal arguments of both parties was made public. The United States argued that the 'special circumstances' provision of Article 6 of the Convention on the Continental Shelf applied in the Gulf of Maine due to the concavity of the U.S. Coastline, and the natural prolongation of the Georges Bank from the United States.[383] The Canadian Government claimed that a case of 'special circumstances' existed and argued that the most suitable line was one based on equidistance. It also rejected the U.S. argument of natural prolongation, noting that: "...it does not believe that the geology, geomorphology, and ecology of the area show that Georges Bank is the 'natural prolongation' of the U.S.A."[384]

Though both parties appointed Special Negotiators to discuss the fishery dispute and the boundary issue in 1977,[385] the interim Fisheries Agreement was suspended by Canada on 2 June 1978,[386] and it seemed that little progress was being made towards the resolution of the dispute. Following the decision in the Anglo-French Arbitration,[387] Canada announced that it was adjusting its claim in line with that decision and was now claiming that certain projections on the United States coast constituted 'special circumstances' which justified the drawing of a line with reference to these coastal points.[388] It was noted that: "The revised line - the 'equitable-equidistance' line - is some fourteen miles southwest of the strict equidistance line on the inside edge of the Georges Bank and twenty-seven miles southwest of the strict line at the 200 mile limit."[389] The United States rejected this claim and reaffirmed its position that the whole of the Georges Bank constituted a natural prolongation of the United States mainland.[390]

(iv) The 1979 Treaties

Despite this further straining of relations the parties continued their negotiations and on 29 March 1979 were able to agree upon two treaties: an Agreement on East Coast Fishery Resources,[391] and a Treaty to Submit to Binding Settlement the Delimitation of the Boundary in the Gulf of Maine Area.[392] The Fisheries Agreement was the subject of a great deal of dispute in the United States and in March 1981 the newly elected Reagan Administration withdrew the Treaty from the Senate.[393] The Boundary Settlement Treaty though was supported by both President Reagan and the Senate, and after its ratification by the United States on 3 June 1981, and Canada's ratification later that year, the Treaty entered into force on 20 November 1981.[394]

(v) The Provisions of the Boundary Settlement Treaty

The treaty is unique in that it provides the first question which has been submitted to a Special Chamber of the International Court of Justice,[395] and it is also the first time in the long history of United States-Canada boundary disputes that a matter has gone before the International Court. In the Special Agreement which submits the dispute, the Chamber is asked to decide: "What is the course of the single maritime boundary that divides the continental shelf and fisheries zones of the United States of America and Canada from a point in latitude 44° 11' 12"N, longitude 67° 16' 46"W to a point to be determined by the Chamber within an area bounded by the straight lines connecting the following sets of geographic coordinates: latitude 40°N, longitude 67°W; latitude 40°N, longitude 65°W; latitude 42°N, longitude 65°W?"[396] The Chamber is also requested to: "...describe the course of the boundary in terms of geodetic lines connecting geographic coordinates."[397] The first written pleadings were submitted to the Court on 27 September 1982, with the counter-memorials submitted on 28 June 1983.[398] Oral argument commenced before the Special Disputes Chamber of the Court on 2 April 1984.

One Canadian commentator has argued that while the parties have requested the Court to delimit a single maritime boundary, the court may determine that different principles apply to the delimitation of the continental shelf and fisheries zones, which would necessitate the drawing of two separate boundary lines.[399] Yet in a recent article dealing with Exclusive Economic Zone boundaries, the authors submitted that the delimitation principles for the two Zones are the same.[400] They commented that since the essence of the law is the duty to negotiate in good faith so as to obtain an equitable solution: "The equitable principles of equidistance and proportionality, therefore, are equally relevant to the two zones. Even the consideration of relevant circumstances is essentially the same. The most relevant circumstances for both zones are clearly geographical and include such features as coastline configuration and the location of islands."[401] While noting that it has been argued that 'historic rights' and economic dependency are relevant factors in the delimitation of an exclusive economic zone, economic dependency is dismissed as an irrelevant consideration, but they do acknowledge that 'historic rights' can be a relevant factor in minimizing the economic dislocation of nationals who have habitually fished in the delimited zone.[402]

(vi) The Issues before the Court and their analysis

With respect to the delimitation of the maritime boundary, the Court will first have to deal with that stretch of water which lies to the south of the present terminating point in Passamaquoddy Bay. Immediately the Court will be faced with the disputed sovereignty of Machias Seal Island which lies just off the coast of Maine and south of the present boundary. Depending on who the Court determines is entitled to ownership of the island the boundary will deviate to either side and will award to one party approximately 450 square miles.[403] Once this issue is determined the Court must then decide whether it will adopt an equidistance line or instead follow the U.S. suggestion that 'special circumstances' exist which require the boundary to be drawn out into the Atlantic through the Northeast Channel.

The special circumstances argument is alleged by the parties to be relevant due to the concavity of the U.S. coastline, the natural prolongation of the U.S. continental shelf to the Northeast Channel, and the extension of the U.S. coastline further to the east through Cape Cod and Nantuckett Island.[404] "The key legal issue appears to be whether the Canadian argument for a narrow interpretation of 'special circumstances' or the United States assertion that 'special circumstances' be elevated to a partnership with equidistance should be adopted."[405] The Canadian allegation that Cape Cod and Nantuckett Island constitute special circumstances similar to those found by the Court of Arbitration to be caused by the Scilly Islands in the Anglo-French Arbitration[406] has been rejected by the United States, and while their eastward extension into the Atlantic does cause a slight distortion of the equidistance line it would seem improbable that the Court would give much weight to the argument due to Cape Cod being unlike the archipelago which made up the Scillies and it also being a major centre of population and commerce.

In an analysis of the argument based on the natural prolongation of the continental shelf, which is relied upon by the United States, many commentators do not agree that the Northeast Channel represents such a structural discontinuity in the continental shelf so as to constitute a natural and legal terminus of the American continental shelf in the area.[407] Rhee has noted that: "The extensive natural prolongation up to the depression of the Northeast Channel may assist and strengthen the United States position, but it seems doubtful that the Channel should be the boundary, not only because there are no precedents to support giving it full effect, but also because making it the boundary would be unfair to Canada, which would lose all present and future interests in the Georges Bank."[408] It has also been suggested that the Northeast Channel would constitute a suitable boundary due to the fact that it is a natural border between the fish stocks of the Georges Bank and Browns Bank off the coast of

Nova Scotia.[409] It remains to be seen how much importance the Court places on this factor in the first case of delimitation of a continental shelf and a fishing zone.

Another factor relied upon by the United States is the proportionality test, in which it argues that an equidistance line is unacceptable due to the 3:1 ratio of coastline in favour of the United States, which on the basis of the North Sea Continental Shelf Cases requires the Court to delimit the continental shelf in a similar proportion to the adjacent coastline. A Canadian author has argued, after considering the submissions put forward in the North Sea Continental Shelf Cases, that the International Court: "...was not adopting a broad principle that the share of continental shelf to be accorded to a state must be in proportion to its coastline, but the narrower principle that, in a situation of otherwise equality in respect of the length of the coastlines, the effect that concavity, convexity, or irregularity of coastal features has upon the size of the continental shelf that accrues to the state concerned must be considered."[410] He concluded that the doctrine has no place in the delimitation of the Gulf of Maine due to the vast lengths of the coastlines belonging to the parties making it impossible to determine finite coastal sectors so as to apply the test.[411]

After Rhee's review of the facts and rejection of both the proposed Canadian and United States boundary lines due to their inequities, he proposes a boundary based on the applicable law and the facts.[412] He argues that the extension of the boundary from its present terminating point should be continued on the basis of an equidistance line until such time as it becomes inequitable,[413] proposing various lines which would continue that first sector of the boundary into the Atlantic Ocean. One suggested line connected with the mid-point of a closing line drawn between Cape Cod and Cape Sable, but he rejected this due to it not fulfilling the proportionality criteria.[414] He eventually suggests four possible lines drawn at a perpendicular to the Cape Cod/Cape Sable closing line,[415] all of which would run from the equidistance line. Only two of these lines would give Canada reasonable access to the Northeast portion of Georges Bank. He noted that these suggested boundary lines would: "...employ the equidistance line on the northern corner of the Gulf where it is appropriate, and embody the doctrine of proportionality in the central and outer areas, taking account of the circumstances of the inequal lengths of the coastline and the concavity/convexity prevailing in those particular areas..."[416] The Rhee proposal was later criticized by two advisers from the U.S. Department of State, who noted that the boundary lines: "...did not satisfy the criterion of coastal proportionality and cannot be justified as effecting an equitable allocation of resources."[417]

The material on page 213 has been removed due to the unavailability of copyright permission. The material is a map showing the Gulf of Maine - Georges Bank region and the boundary lines proposed by the United States and Canada. The source of this material was: Rhee, Equitable Solutions to the Maritime Boundary Dispute Between The United States and Canada in the Gulf of Maine, 75(1981) A.J.I.L., 590 at 622.

(vii) The possible effect of the Judgment

The Gulf of Maine dispute involves: "...sovereign rights and jurisdiction over 22,700 square miles on Georges Bank, from which Canada at present harvests $66 million of fish annually in landed value and which has good hydrocarbon potential..."[418] It is, therefore, clear that for Canada the judgment in the Gulf of Maine case holds great economic significance. It will also be of great interest to see whether the International Court applies similar principles to those it used in the 1982 Tunisia-Lybia Case, or whether it relies on new concepts of maritime boundary delimitation.

(c) The Dixon Entrance Dispute

The maritime boundary between the United States and Canada in the Dixon Entrance has also been the scene of great dispute in previous years, though presently the issue has taken a backseat to the Gulf of Maine delimitation. The Alaska Boundary was the subject of a decision by an Arbitration Tribunal in 1903[419] in which the original 1825 Treaty between Russia and Great Britain was interpreted.[420] While the line drawn by the Arbitrators in the 'Alaska Panhandle' was the subject of some discussion,[421] the award was accepted as definitive. "Within a few years of the award, however, questions arose concerning the maritime boundary between Canada and the United States in the stretch of water known as the Dixon Entrance, dividing the Alexander archipelago of Alaska and the Queen Charlotte Islands of British Columbia. The issue was whether the line drawn by the Tribunal from Cape Murzon on Dall Island to the entrance of Portland Channel was intended as a maritime boundary, or whether it simply served to divide the land territories of the respective nations. This question is still to be answered."[422]

While the issue of the significance of the A-B line in the Dixon Entrance was the subject of a suggestion in 1973 by the United States that the matter be forwarded to the International Court of Justice,[423] since that time the recognition of the extension of maritime boundaries by the Third United Nations Conference on the Law of the Sea and the uncertainty over boundary delimitation principles has seen the parties allow the issue to simmer while the Gulf of Maine dispute is settled.[424]

The extension of the boundary in the Strait of Juan de Fuca has not been an issue of recent negotiation between the two countries, with the delimitation of the boundary relatively simple compared to the other disputed areas. The United States has suggested that an equidistance line would be suitable for the seaward extension of the boundary into the Pacific, but no action has been taken on this proposal by Canada.[425]

(d) The boundary in the Beaufort Sea

The boundary between Canada and the United States in the Beaufort Sea has the potential for being the next major border dispute between these two countries after the Gulf of Maine boundary is settled. The Beaufort Sea became an area of renewed interest to both parties with the discovery of offshore oil in the late 1960's,[426] and soon after it became an area of political controversy when the U.S. tanker 'SS Manhatten' navigated Arctic waters.[427] Irrespective of the extension of a maritime boundary into the sea for the purpose of delimiting the continental shelf or exclusive economic zone, the Canadian position has traditionally been that sovereignty extends from the termination of the Alaska/Canada land frontier at the 141° Meridian right up to the North Pole. While this claim has been built up by a series of statements and acts over a great many years, two important events can be noted in the history of this claim. By virtue of America's purchase of Alaska from Russia in 1867 and Canada's succeeding Great Britain as the sovereign state adjacent to Alaska, the 1825 border treaty[428] between Russia and Great Britain is of some importance. The Treaty described the boundary in the Beaufort Sea as follows: "...from this last mentioned point the line of demarcation shall follow the summit of the mountains situated parallel to the coast as far as the point of intersection of the 141st degree of west longitude; and finally from the said point of intersection, the said meridian line of the 141st degree in its prolongation as far as the Frozen Ocean shall form the limit between the Russian and British possessions on the continent of America to the Northwest."[429]

Apart from the Canadian claim being based on the above treaty, emphasis is also placed on the 'sector' theory, of which the chief Canadian protagonist was Senator Poirier, who proclaimed in a speech to the Canadian Senate in 1909 that: "...in future partition of northern lands, a country whose possession today goes up to the Arctic regions, will have a right, or should have a right, or has a right to all the lands that are to be found in the waters between a line extending from its eastern extremity north and another line extending from the western extremity north. All the lands between the two lines up to the North Pole should belong and do belong to the country whose territory abuts up there."430 While the sector theory does have a greaty many detractors,431 Canada has used it as a basis upon which to build its claim to sovereignty in the Arctic during the Twentieth centurty.

The United States position in regard to the Beaufort Sea boundary is based on the equidistance principle,432 it being proposed as the most equitable method of delimitation due to the absence of special circumstances in the adjacent coastlines or continental shelf.433 Opinions differ as to what weight should be given to the Canadian argument,434 while there is also disagreement over whether the concavity of the Canadian coastline is sufficient to constitute a 'special circumstance'.435 This boundary dispute is also awaiting the outcome of the Gulf of

Maine case before the parties finalize their respective claims and negotiating positions, yet the issue is one worth watching carefully, especially if Canada declares straight baselines around much of the Arctic archipelago,[436] which would succeed in focusing American attention once again on the seabed and surface waters of the Arctic.

(e) Canada's maritime boundary with France

Canada and France began discussions with respect to the delimitation of a maritime boundary between the French islands of St. Pierre and Miquelon and Newfoundland in the late 1960's after conflicts arose over seabed exploration permits that both countries were granting in the adjacent offshore.[437] These two French islands, which lie at their nearest point 14 nautical miles south of Newfoundland, have an area less than 100 square miles and a population of about 5,000, which has close ties with Newfoundland.[438] France argued that under Article 6 of the Convention on the Continental Shelf it was entitled to claim an equidistance boundary, the effect of which: "...would be to encompass for France a seabed amounting to about 19,000 square miles and extending about 85 miles south of St. Pierre, there being 170 miles between it and Nova Scotia."[439] Canada argued that such a claim was disproportionate to the size of the island when compared to the surrounding Canadian territory and was of the opinion that 'special circumstances' required that a boundary other than one based on equidistance be drawn in this case.[440] A boundary agreement was reached in a Releve des Conclusions[441] of 26 May 1972 in which France agreed to a 12 mile continental shelf for the islands, thus creating a French enclave in a zone of Canadian sovereignty.[442]

With the declaration of Canada's intention to proclaim a 200 mile Fishery Zone in 1977[443] both parties undertook discussions[444] which resulted in an interim fisheries agreement, providing for the retention of previous French fishing rights in the offshore waters of St. Pierre and Miquelon until such time as a permanent boundary was delimited.[445] France declared an Exclusive Economic Zone around the islands in 1977.[446] Since that time negotiations have continued regarding the delimitation of a fisheries resources boundary,[447] but as yet it does not seem that the matter has been resolved.

(f) Canada's Maritime boundary with Denmark

Canada and Denmark in 1973[448] agreed upon the delimitation of their continental shelf boundary through Davis Strait and Baffin Bay between Greenland and the Canadian territory of Baffin and Ellesmere Islands. The boundary is a median line,[449] which runs for the whole distance of the waters separating the two countries. One interesting provision is that in the area between 67°N and 69°N latitude the boundary may be renegotiated if the: "...international law concerning the delimitation of national jurisdiction over the continental shelf be altered in a manner acceptable to both Parties..."[450] No current negotiations on this boundary have been reported.

(g) The maritime boundary between the United States and Mexico

As has been noted before,[451] the United States and Mexico agreed upon certain maritime boundaries in the 1848 Treaty of Guadelupe Hidalgo and it was not until 1970 that these boundaries were extended. The boundary in the Gulf of Mexico was extended from the centre of the mouth of the Rio Grande to a point offshore, from where it continued on an equidistance straight line for 12 miles from the baseline.[452] The Pacific boundary at San Diego was also extended on an equidistance line which gave full effect to the Mexican Islos Los Coronados and finished at a point 12 miles equidistant from these islands and Point Loma on the California coast.[453]

With the extension of fishing zones in the 1970's, the parties reached a preliminary interim agreement on their fishery zones in 1976,[454] and those interim boundary lines were essentially adopted as permanent boundaries in a 1978 Treaty.[455] The treaty provided for the extension of the existing 12 mile boundaries to 200 miles, and also a shorter boundary in the Gulf of Mexico where the 200 mile zones overlap opposite the Yucan Peninsula and Louisiana.[456] The Treaty gives full effect to the U.S. islands off the California coast and the Mexican islands of Yucan, and as a consequence: "A technical exercise, involving equal area exchanges along a precise equidistance line using islands as base points, resulted in simplified boundaries that have only three segments in the Pacific, two segments in the western Gulf of Mexico, and three segments in the eastern Gulf of Mexico."[457]

(h) The maritime boundary between the United States and Cuba

As a consequence of the declaration by Cuba of a 200 nautical mile zone in February 1977, Cuba and the United States began negotiations that year for the delimitation of their maritime boundaries.[458] The two countries, with the United States arguing that an equidistant line giving full effect to the Florida Keys and Dry Tortugos was an appropriate boundary, concluded an interim agreement in April 1977,[459] which was eventually formulated into a Treaty later that year.[460] The Treaty, which provided for 27 turning points between the two countries,[461] was agreed upon after a complicated process, in which "...after establishing a common datum, the parties determined an equidistance line, using the natural low-water baselines. A second equidistance line was determined with comparable construction lines for both sides as base points. The parties adopted a simplified version of a third line that was intermediate between the first two. The line established by the Treaty - although close to an equidistance line giving full effect to islands - is in fact a boundary every turning point of which has been established by negotiation."[462] The United States has also concluded a maritime boundary with Venezuela[463] and other Carribbean and Pacific Ocean countries,[464] but it is not in the scope of this work or the intention of the author to consider in detail every maritime boundary agreement that has been concluded.

9. OTHER MARITIME BOUNDARY AGREEMENTS

To complete this chapter brief attention will be given to five maritime boundary delimitations, all of which have some special feature about them.

(a) Continental Shelf Boundaries in the North Sea

While the continental shelf boundary dispute between West Germany, Denmark and the Netherlands was eventually determined by the International Court,[465] other boundary agreements were successfully reached between the countries abutting onto the North Sea without the need for judicial determination. Of these perhaps the most interesting was that of Norway and the United Kingdom,[466] who agreed on a continental shelf boundary which was based: "...for administrative convenience on a line, every point of which is equidistant from the nearest points of baselines from which the territorial sea of each country is measured."[467] The agreement provided for eight turning points with straight lines being used to connect them,[468] and it also made provision for the joint exploitation of any mineral resources which extended across the boundary line.[469] While the use of the equidistance principle was in accordance with Article 6 of the 1958 Convention on the

Continental Shelf, the United States Office of the Geographer noted that: "The distinguishing feature of this Agreement between Norway and the United Kingdom is that the deep Norwegian Trench was ignored in the determination of the Continental Shelf Boundary. If the coastal 100 fathom contour had been used in delimiting the Norwegian claim to the continental shelf, their claim would have been virtually non-existent due to the narrow coastal zone of depths less than 100 fathoms in depth. Thus, the Trench was ignored as a limiting factor and the continental shelf boundary was delimited without regard to the 100 fathom contour."[470] The Norwegian Trench was also ignored in the delimitation agreement between Norway and Denmark, this boundary being drawn on the basis of equidistance.[471]

(b) Maritime Boundary Agreement between Iran and Saudi Arabia

The boundary between Iran and Saudi Arabia in the Persian Gulf was the subject of an agreement in 1968[472] in which the parties had two difficult issues to resolve. The first was with respect to the sovereignty of the islands of Al-'Arabiyah and Farsi which lie in the middle of the Gulf at the half-way point of the boundary. The parties resolved this potentially divisive issue by awarding sovereignty over Al-'Arabiyah to Saudi Arabia and over Farsi to Iran, and then limiting the territorial sea of each island to twelve nautical miles and drawing an equidistant line where the boundaries overlapped.[473] When the main boundary line ran into the territorial seas of these islands it followed the outer edge of the island's territorial sea till it reached the equidistance line, at which point it cut between the two islands and then followed the territorial sea edge till it once again continued along the main continental shelf dividing line.[474]

The other significant feature about this boundary was that it attempted to equitably apportion the seabed resources in the northern sector. This part of the boundary was complicated by the presence off the Iranian coastline of the island of Kharg which the Iranians insisted should be used as a basepoint in any delimitation. In 1965 the parties had provisionally agreed upon a boundary which gave 'half-effect' to the island, one which was equidistant of a median line giving full effect to the island and one that gave no effect at all.[475] Eventually a new line was devised which gave effect to the concept of an equitable division of the oil in the seabed, in which the boundary ran for 20 miles: "...in a slightly zigzag fashion from a point on the 1965 line some 32 miles above Al-Fariziyah northwesterly until it intersected the de facto offshore boundary between Saudi Arabia and the Saudi Arabia - Kuwait Neutral Zone. As compared with the 1965 line, which it crossed and recrossed, it gave only a slight net gain in the seabed area to Iran, but presumably a substantial increase in Iran's estimated oil reserves."[476]

(c) Delimitation between Italy and Yugoslavia

In 1968, Italy and Yugoslavia agreed upon the delimitation of their continental shelf boundary[477] in the Adriatic Sea. The boundary is 353 nautical miles long and is composed of 43 turning points.[478] Provision was also made for the joint exploration of any natural resources found straddling the boundary line.[479] A feature of this agreement was the concession made by Yugoslavia with respect to three Yugoslav islands located near the middle of the Adriatic. In the case of the Pelagruz and Kajola Islands, their respective territorial seas were limited to 12 miles, while two other Yugoslav islands were offset by shifting the boundary to the coast in favour of Italy. As a consequence of this the boundary was basically a median line between the Italian coastline and the major Yugoslav islands.[480] "This Agreement is an example of what has been achieved through negotiation when strict application of the equidistant principle results in a disproportionate division of the shelf between two countries as a consequence of the random location of small islands."[481]

(d) The Beagle Channel Arbitration

In 1967 Argentina and Chile agreed to submit to a Court of Arbitration a dispute which existed over their respective jurisdiction in the Beagle Channel,[482] a stretch of water at the tip of South America which is the frontier between these two countries. While the dispute eventually concerned sovereignty over 'internal waters'[483] and three islands at the mouth of the Channel[484], Argentina also requested the Arbitral Tribunal to determine in the disputed area: "the boundary-line between the respective maritime jurisdiction of the Argentine Republic and of the Republic of Chile..."[485]

The decision, which was based on an 1881 Boundary Treaty[486] and the evidence of occupation and acts of sovereignty over the disputed islands, awarded to Chile the disputed islands of Picton, Nueva, and Lennox.[487] "However, this area was so small that the Tribunal had no competence to consider maritime boundaries other than the boundary between the territorial waters of the two States in the Channel."[488] With respect to Argentina's request for a delimitation of the maritime boundary, Greig has noted: "As the dispute had achieved its contempory significance largely because of the 200 mile claims to an 'epicontinental sea', the Court was in fact being asked a preliminary issue to what was, in Argentina's eyes at best, the real substance of that dispute. It was hardly surprising therefore that the decision in the case did nothing to resolve the essential differences between the parties."[489]

(e) The Continental Shelf between Iceland and Jan Mayen

In 1980 Norway and Iceland concluded an Agreement which dealt with fishing and continental shelf rights between Iceland and Jan Mayen Island. The Agreement recognized that Iceland was entitled to a 200 mile Exclusive

Economic Zone but left open the issue of a continental shelf boundary, deciding to submit that matter to a Conciliation Commission.[490] The Commission had as its mandate: "...the submission of recommendations with regard to the dividing line for the shelf area between Iceland and Jan Mayen."[491] Jan Mayen Island is a volcanic island which lies in the North Sea 290 miles north-east of Iceland, it is under Norwegian sovereignty and has a permanent population of between 30 and 40.[492]

In May 1981 the Report of the Conciliation Commission was released in which two main factors were considered. The first was the Draft Convention on the Law of the Sea which had been released in August 1980.[493] Article 121 of that draft provided that islands were entitled to their own exclusive economic zone and continental shelf in accordance with the provisions of the draft Convention.[494] An island was defined as being: "...a naturally formed area of land surrounded by water, which is above water at high tide."[495] The Commission concluded that Jan Mayen was an island for the purposes of Article 121 and that consequently Norway was fully entitled to claim an economic zone and continental shelf around it.[496]

The other factor considered by the Commission was a Geological Report prepared by a group of experts which dealt with the seabed area between Jan Mayen and Eastern Iceland.[497] The main purpose of the report was to study the Jan Mayen Ridge and to determine what effect it had on the continental shelf area claimed by both countries.[498] After a thorough consideration of the evidence, the report concluded that: "...geologically Jan Mayen Ridge is a microcontinent that predates both Jan Mayen and Iceland which are composed of younger volcanics; therefore, the ridge is not considered a natural prolongation of either Jan Mayen or Iceland."[499] The Commission concluded that following this report the 'natural prolongation' test was not a suitable delimitation criterion to use in this case.[500]

After examining state practice and Court decisions concerning maritime boundary delimitation,[501] in which the International Court's emphasis on the need to consider all the relevant circumstances was noted, it was concluded that: "...an approach should be used which takes into account both the fact that agreement by Iceland and Norway on Iceland's 200 mile economic zone has already given Iceland a considerable area beyond the median line and the fact that the uncertainties with respect to the resource potential of the area create a need for further research and exploration."[502] Consequently a joint development agreement for the seabed was recommended rather than a continental shelf boundary different from the existing economic zone boundary.[503] Noting Iceland's reliance on imported hydrocarbons,[504] it was recommended that Iceland be entitled to a 25% interest in the development of the seabed north of the 200 mile economic zone,[505] while Norway was given an option, at the discretion of Iceland, of a similar interest in the area south of the line.[506]

The main significance of the Commission's recommendations with respect to delimitation techniques is the recognition of Jan Mayen's entitlement to a continental shelf and exclusive economic zone in accordance with the draft Convention on the Law of the Sea,[507] yet the detailed provisions[508] dealing with the joint development agreement will probably be of more importance to those states which are encountering difficulties in reaching agreement over the delimitation of their continental shelf.

As noted in the introduction to this Chapter, its purpose was to concentrate on the various maritime boundary delimitations that have occured since the 1958 Law of the Sea Conventions and the 1982 Convention. While it was intended to treat each case as a separate delimitation, it was necessary in some instances to refer back to the previous decisions of the International Court of Justice or of the Anglo-French Court of Arbitration. Many of these delimitations or disputes were also taking place during the United Nations Law of the Sea Conference, and where it was relevant the trend in the debates and various draft conventions have been referred to. The following Chapter will deal explicitly with the Law of the Sea Conference and the events leading up to the passing of the 1982 Law of the Sea Convention. Only after an examination of the provisions in that Convention will the main delimitation principles that have emerged from the case studies undertaken in this Chapter be able to be compiled into a list of what constitutes the current law on the subject of maritime boundary delimitations between states.

FOOTNOTES

1 *North Sea Continental Shelf, Judgment*, I.C.J. Reports 1969, p. 3

2 *Continental Shelf (Tunisia/Libya Arab Jamahiriya), Judgment*, I.C.J. Reports 1982, p. 3

3 United Kingdom of Great Britain and Northern Ireland and the French Republic: Delimitation of the Continental Shelf, Decision of the Court of Arbitration of 30 June 1977, 18(1979) *I.L.M.* 397

4 Treaty between Australia and the Independent State of Papua New Guniea concerning Sovereignty and Maritime Boundaries in the area known as Torres Strait, and related matters, signed in Sydney on 18 December 1978, 18(1979) *I.L.M.* 291; hereafter referred to as the "Torres Strait Treaty"

5 Smith, A Geographical Primer to Maritime Boundary Making, 12 (1983) *Ocean Development and International Law*, 1 at 3

6 Supra. n. 1

7 Treaty between the Federal Republic of Germany and the Kingdom of the Netherlands concerning the lateral delimitation of the continental shelf near the coast, dated 1 December 1964, in, Memorial submitted by the Government of the Federal Republic of Germany, *I.C.J. Pleadings,* North Sea Continental Shelf, Vol. 1, Annex 3. The Federal Republic of Germany is hereafter referred to as "West Germany"

8 Treaty between the Federal Republic of Germany and the Kingdom of Denmark concerning the delimitation of the continental shelf of the North Sea near the coast, dated 9 June 1965, in, Ibid. Annex 6.

9 Supra. n. 1, para. 6

10 Special Agreement for the submission to the International Court of Justice a difference between the Kingdom of Denmark and the Federal Republic of Germany concerning the delimitation, as between the Kingdom of Denmark and the Federal Republic of

Germany of the continental shelf in the North Sea, in I.C.J. Pleadings, North Sea Continental Shelf, Vol. 1, p. 6; Special Agreement for the submission to the International Court of Justice a difference between the Federal Republic of Germany and the Kingdom of the Netherlands concerning the delimitation, as between the Federal Republic of Germany and the Kingdom of the Netherlands, of the Continental Shelf in the North Sea, in, I.C.J. Pleadings, North Sea Continental Shelf, Vol. 1, p. 8

11 Op Cit. North Sea Continental Shelf, Judgment, p. 8 - point 1

12 Ibid. p. 9 - point 2

13 Ibid. p. 9 - point 3

14 Ibid. p. 9 - point 4

15 Ibid. Denmark, p. 10, point 1; Netherlands, p. 10 - point 1

16 Ibid. Denmark, p. 10 - point 2; Netherlands p. 11 - point 2

17 Ibid. Denmark, p. 10 - point 3; Netherlands, p. 11 - point 3. See: Figure 3, showing the boundaries which existed at the time of the case and the lines suggested by the parties.

18 U.N. Doc. No. ST/LEG/SER. E/2. p. 625; Denmark ratified the Convention on 12 June 1963

19 Ibid. The Netherlands ratified the Convention on 18 February 1966

20 Ibid. The Federal Republic of Germany signed the Convention on 30 October 1959, but has not ratified it as yet.

21 Supra. n. 1, p. 17, para. 8

22 Ibid. p. 22, para. 18

23 Ibid. p. 31 - 32, para. 44

24 Ibid. p. 32, para. 46

25 Ibid. p. 34, para. 50

26 Ibid. p. 35 - 16, para. 55

27 Ibid. p. 38, para. 62

28 Ibid. p. 38 - 39, para 63. See: Article 12, Convention on the Continental Shelf, U.N. Doc. No. A/CONF. 13/L.55

29 Ibid. p. 45, para. 81. See: p. 41-45, para. 70 - 80 for the Court's discussion of customary international law.

30 Ibid. p. 46, para. 83

31 Ibid. p. 45 - 46, para. 82

32 Ibid. p. 47, para. 85

33 Ibid. p. 49 - para. 89

34 Ibid. p. 51, para. 96

35 Ibid. p. 51 - 52, para. 97

36 Ibid. p. 52, para. 98

37 Ibid. p. 53, para. 101

38 Ibid. p. 54, para. 101

39 Treaty between the Federal Republic of Germany and the Kingdom of Denmark relating to the Delimitation of the Continental Shelf under the North Sea, done at Copenhagen on January 28, 1971, 10(1971) I.L.M. 603; Treaty between the Kingdom of the Netherlands and the Federal Republic of Germany on the delimitation of the Continental Shelf under the North Sea, done at Copenhagen on January 28, 1971, 10(1971) I.L.M. 607. See: Article 2 re. procedures to be followed upon the discovery of seabed minerals which straddle the boundary; Article 4 re. granting of exploration licenses. For a discussion of the final delimitation agreements, See: Goldie, The North Sea Continental Shelf Cases: A Postscript, 18(1972) New York Law Forum 411 - 434

40 See: Brown, The North Sea Continental Shelf Cases, 23(1970) Current Legal Problems, 187 at 198; Friedmann, The North Sea Continental Shelf Cases - a Critique, 64(1970) A.J.I.L., 229 at 239

[41] Prescott, The Political Geography of the Oceans, 169(1975).

[42] See: Brown, The Legal Regime of Hydrospace, 70 - 71 (1971); Op Cit. Prescott, p. 169

[43] Grisel, The Lateral Boundaries of the Continental Shelf and the Judgment of the International Court of Justice in the North Sea Continental Shelf Cases, 64(1970) A.J.I.L., 562 at 577

[44] Ibid. p. 589

[45] Ibid.

[46] Ibid. p. 590 - 591

[47] Ibid. p. 593

[48] Supra. n. 3, p. 400, Article 2(1)

[49] Ibid. p. 408 - 9, para. 6, 7

[50] Ibid. p. 490, para. 9

[51] Ibid. p. 409, para. 11

[52] Ibid. p. 408, para. 4

[53] U.N. Doc. No. ST/LEG/SER. E/2, p. 626

[54] Supra. n. 3, p. 402, points A. 1 -2. Granville Bay is that portion of the French coastline immediatly to the east of the Channel Islands

[55] Ibid. p. 402, point A.4

[56] Ibid. p. 402, point B.7

[57] Ibid. p. 402 - 403, point B.8

[58] Ibid. p. 403 - point B.9 - 10

[59] U.N. Doc. No. ST/LEG/SER. E/2, p. 628

[60] Supra. n. 3, p. 403, points 1, A -B

[61] Ibid. p. 404, points 3 - 4

[62] Ibid. p. 404, points 5 - 6

[63] Ibid. p. 411, para. 19 - 20

[64] Ibid. p. 411, para. 21

[65] Ibid. p. 413, para. 33

[66] Ibid. p. 414, para. 34

[67] Ibid. p. 416, para. 44

[68] Ibid. p. 417, para. 47 - 48

[69] Ibid. p. 419, para. 61

[70] Ibid. p. 422, para. 74

[71] Ibid. p. 421, para. 68

[72] Ibid. p. 421, para. 70

[73] Ibid.

[74] Ibid. p. 422, para. 75

[75] Ibid. p. 422, para. 76 - 86

[76] Ibid. p. 426, para. 94

[77] Ibid. p. 426 - 427, para. 97

[78] Ibid. p. 427, para. 99

[79] Ibid. p. 427, para. 101

[80] Ibid. p. 428 - 429, para. 109 - 110

[81] Ibid. p. 428, para. 107

[82] Ibid. p. 428, para. 108

[83] Ibid. p. 441, para. 184

[84] Ibid. p. 442, para. 186

[85] Ibid. p. 442, para. 187

[86] Ibid. p. 442, para. 188

[87] Ibid. p. 443, para. 194

88 Ibid. p. 443 - 444, para. 196

89 Ibid. p. 444, para. 198

90 Ibid. p. 444, para. 201

91 Ibid. p. 444 -445 para. 202

92 Ibid. p. 454, para. 245

93 Ibid.

94 Ibid. p. 455, para. 251

95 Ibid. See: Figure 4, showing the boundary delimited by the Court.

96 Ibid. p. 401: "Either party may, within three months of rendering of the decision, refer to the Court any dispute between the parties as to the meaning and scope of the decision."

97 United Kingdom of Great Britain and Northern Ireland and the French Republic: Delimitation of the Continental Shelf, Decision of the Court of Arbitration of 14 March 1978, 18(1979) I.L.M. 463.

98 Ibid. p. 478, para. 34

99 Ibid. p. 478 - 479, para. 37

100 Ibid. p. 463

101 Ibid. p. 491, para. 105

102 Ibid. p. 492, para. 111

103 Ibid. For general comments on this second decision by the Court of Arbitration, See: Colson, The United Kingdom - France Continental Shelf Arbitration: Interpretative Decision of March 1978, 73(1979) A.J.I.L. 112 - 120; Merrils, The United Kingdom - France Continental Shelf Arbitration, 10(1980) California Western International Law Journal, 314 at 349 - 355

104 See: Berry, Delimitation and the Anglo-French arbitration, 6 A.Y.I.L., 139 - 152; Colson, The United Kingdom - France Continental Shelf Arbitration, 72(1978) A.J.I.L. 95 - 112.

[105] Op Cit. Merrils, p. 360

[106] Blecher, Equitable Delimitation of Continental Shelf, 73(1979) *A.J.I.L.*, 60 at 63; Brown, The Anglo - French Continental Shelf Case, 16(1979) *S.D.L.R.*, 461 at 482

[107] Ibid. Brown, p. 483 - 484. For an analysis of the natural prolongation argument, *See:* Chapter 7

[108] Ibid. p. 521 - 522; McRae, Delimitiation of the Continental Shelf between the United Kingdom and France: The Channel Arbitration, 15(1977) *C.Y.I.L.*, 173 at 183

[109] Ibid. McRae, p. 183

[110] Op Cit. Blecher, p. 71 - 73

[111] Bowett, The Arbitration between the United Kingdom and France concerning the Continental Shelf Boundary in the English Channel and South-Western Approaches, 49(1978), *B.Y.I.L.* 1 at 14.

[112] Op Cit. McRae, p. 193

[113] Ibid. p. 194. *See:* Op Cit. Blecher p. 82

[114] Op Cit. Bowett, p. 21 - 26

[115] Op Cit. Brown, p. 514 - 518

[116] Ibid. p. 518

[117] Op Cit. Bowett, p. 8. For a more detailed discussion of the status of islands in boundary delimitations *See*: Chapter 7

[118] Ibid. p. 529; Op Cit. Colson, The United Kingdom - France Continental Shelf Arbitration, p. 111

[119] Ibid. Brown, p. 529, Colson, p. 111; Op Cit. McRae, p. 196 - 197

[120] Op Cit. Merrills, p. 363

[121] Aegean Sea Continental Shelf, Judgment, *I.C.J. Reports 1978*, p. 3

[122] Ibid. para. 109. See: Johnson, The International Court of Justice Declines Jurisdiction Again (The Aegean Sea Continental Shelf Case), 7 A.Y.I.L. 309 - 331

[123] The author has been unable to discover any reference to the dispute in literature since 1979

[124] Supra. n.121, para 16

[125] Ibid.

[126] Ibid.

[127] Ibid. para. 17

[128] Ibid. para. 17 - 22

[129] Ibid. para. 22

[130] For further background leading up to these events in 1976, See: Phylactopoulos, Mediterranean Discord: Conflicting Greek - Turkish Claims on the Aegean Seabed, 8(1974) International Lawyer, 431 - 441

[131] Resolution 395(1976), United Nations: Security Council Resolution on the Dispute Between Greece and Turkey over the Aegean Sea Continental Shelf, 15(1976) I.M.L. 1235

[132] Ibid. para. 2

[133] Ibid. para. 3

[134] Ibid. para. 4

[135] Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976, p. 3

[136] Ibid. para. 15

[137] Ibid. para. 1

[138] Ibid. para. 30. See: op Cit. Johnson, 313-315; Robol, Jurisdiction-Limits of Consent - The Aegean Sea Continental Shelf Case, 18(1977) H.I.L.J. 649 - 675; Gross, The Dispute between Greece and Turkey concerning the Continental Shelf in the Aegean, 71(1977) A.J.I.L. 31 - 59.

[139] Greece - Turkey: Agreement on Procedures for Negotiation of Aegean Continental Shelf Issue, done at Berne, November 11, 1976, 16(1977) I.L.M. 13

[140] Ibid. para. 9

[141] Ibid. para. 1

[142] Ibid. para. 2

[143] Ibid. para. 8

[144] Ibid. para. 6

[145] Supra. n.121, para. 24 - 26

[146] Ibid.

[147] Ibid. para.48

[148] Ibid. para. 90. The Court found: "...that the present dispute is one which 'relates to the territorial status of Greece' within the meaning of reservation (b) in Greece's instrument of Accession to the General Act. It accordingly finds that Turkey's invocation of the reservation on the basis of reciprocity has the effect of excluding the present dispute from the application of Article 17 of the Act."

[149] Ibid. para. 94

[150] Ibid. para. 107. See: Op Cit. Johnson

[151] See: Rozakis, The Greek-Turkish Dispute over the Aegean Continental Shelf, 4 - 11(1975); Georgacopoulos, The Aegean Sea Continental Shelf Problem: Presentation of the Greek Case, 6(1978) International Business Lawyer, 479 at 480 - 484

[152] Ibid. Georgacopoulos, p. 480 - 482

[153] Ibid. p. 482 - 483. See: Article 121 of the United Nations Convention on the Law of the Sea, U.N. Doc. No. A/CONF. 62/122, or, Simmonds, U.N. Convention on the Law of the Sea 1982 (1983), for the current treaty law on this matter.

[154] Supra. n. 1

[155] Op Cit. Georgacopoulos, p. 486

[156] Ibid. p. 489

[157] Ibid.

[158] Ibid. p. 490

[159] Kaymen, The Aegean Sea Continental Shelf Problem. Presentation of the Turkish Case, 6(1978) International Business Lawyer, 495 at 503 - 504, quoting from Turkey's Note, dated 27th February, 1974

[160] Ibid. p. 504

[161] Ibid. p. 505

[162] Ibid. p. 507

[163] Bowett, The Legal Regime of Islands in International Law (1979)

[164] Ibid. p. 252

[165] Ibid. p. 262 - 263

[166] Ibid. p. 265

[167] Ibid. p. 267

[168] Ibid. p. 269

[169] Supra. n. 3, para. 202

[170] Op Cit. Bowett, The Legal Regime of Islands in International Law, p. 279

[171] Ibid. p. 275 - 276

[172] Ibid. p. 276 See: Karl, Islands and the Delimitation of the Continental Shelf: A Framework for Analysis, 71(1977) A.J.I.L. 642 at 671 - 672, and; Mihaloglou, Correspondence: Delimitation of the Aegean Continental Shelf, 72(1978) A.J.I.L. 617 - 619.

[173] Symmons, *The Maritime Zones of Islands in International Law*, 148(1979); Supra. n.135, para. 28

[174] Op Cit. Bowett, *The Legal Regime of Islands in International Law*, p. 271 - 277. *See*: Article 121, United Nations Convention on the Law of the Sea, supra. n. 153; the discussion of the Jan Mayen Continental Shelf Case between Iceland and Norway found in Part 9 of this Chapter; and the discussion of the status of islands in maritime boundary delimitations in Chapter 7

[175] *See:* Articles 3, 76, 121, United Nations Convention on the Law of the Sea, Supra. n. 153. *Note:* Greece is a signatory of the Law of the Sea Convention, Turkey is not, U.N. Doc. No. ST/LEG/SER. E/2. p. 632 - 633

[176] Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing certain Sea-Bed Boundaries, Done at Canberra on 18 May 1971, in, United Nations Legislative Series, *National Legislation and Treaties Relating to the Law of the Sea*, ST/LEG/SER.B/18, p. 433

[177] Ibid. Article 1

[178] Signing of Sea-Bed Agreement with Indonesia, 42(1971) *Current Notes on International Affairs*, 283

[179] Supra. n. 176, Article 3

[180] Ibid. Article 4

[181] Ibid. Article 7

[182] Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia establishing certain Sea-Bed Boundaries in the area of the Timor and the Arafura Seas, Supplementary to the Agreement of 18 May 1971, Done at Jakarta on 9 October 1972, in, Op Cit. *National Legislation and Treaties Relating to the Law of the Sea*, p. 441

[183] Ibid. Article 1

[184] Ibid. Article 2

[185] The Australian - Indonesian Seabed Agreement, Joint Communique of 9 October 1972, 43(1972) *Current Notes on International Affairs*, 510

[186] Supra. n. 182, Article 8(1). Ibid. p. 511

[187] Ibid. Article 7

[188] Agreement between Australia and Indonesia concerning certain boundaries between Paupa New Guinea and Indonesia, done at Canberra on 26 January 1973, in, Op Cit. *National Legislation and Treaties Relating to the Law of the Sea*, p. 444. *See:* The Papua New Guinea-Indonesia Boundary Agreement, 44(1973) *A.F.A.R.* 107 - 110

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[201] Ibid. p. 78 - 80. Considered in this Chapter in Parts 6, 8 and 9

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[203] Ibid p. 81 - 86

[204] Ibid. p. 86. *See:* also, Prescott, *Maritime Jurisdiction in Southeast Asia: A Commentary and Map*, 48(1981). *Note:* The status of troughs in maritime boundary delimitations is noted in Chapter 7

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[234] Ibid. Article 2(3)(b)

[235] Ibid. Article 3(2)

[236] Ibid. Article 3(1)

[237] Ibid. Article 4(3)

[238] Ibid. Article 10(1)

[239] Ibid. Article 10(3)

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[252] Op Cit. Lumb, Legal Aspects of the Torres Strait Treaty, p. 56 - 57. *See:* Chapter 7 for a more thorough discussion of 'enclaves'

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[278] Article II, Agreement between Japan and the Republic of Korea concerning Joint Development of the Southern Part of the Continental Shelf Adjacent to the Two Countries, signed in Seoul, 5 February 1974, in, Op Cit. New Directions in the Law of the Sea: Documents - Volume IV, p. 118

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[289] Op Cit. Prescott, Maritime Jurisdiction in Southeast Asia: A Commentary and Map. p. 11 - 13

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[291] *See:* Ibid. p. 115; Op Cit. Prescott, *Maritime Jurisdiction in Southeast Asia: A Commentary and Map*, p. 13

[292] Park, Boundary Delimitation in the South China Sea, in, *International Symposium on the New Law of the Sea in Southeast Asia: Developmental Affects and Regional Approaches*, 131(1983)

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[296] *See:* Ibid. p. 124; Op Cit. Park, Boundary Delimitation in the South Cina Sea, p. 131

[297] Ibid. Yuan, p. 125. *See:* Infra, Part 8 for a discussion of the Gulf of Maine dispute

[298] Supra. n. 2

[299] Supra n. 1

[300] Supra n. 3

[301] For a discussion of the Conference debates on maritime boundary delimitation. See: Chapter 6

[302] Supra. n. 2, per Judge Evensen, p. 306, para 20

[303] Ibid.

[304] Ibid. Special Agreement of Tunisia, p. 21, para.2; Special Agreement of Libya, p. 23, para. 4

[305] See: International Boundary Study, No. 121: Libya - Tunisia Boundary (1972)

[306] See: Supra. n. 2, p. 34 - 35, para. 17 - 20

[307] Ibid. p. 35, para. 21

[308] Ibid.

[309] Ibid. p. 21, para 2 - Article 1 See: also the Libyan Special Agreement, p. 23, para. 4 - Article 1

[310] Ibid.

[311] Ibid. p. 21, para. 4 - Article 1

[312] Ibid. p. 39 - 40, para. 29

[313] Ibid. p. 26, para 15, I.1

[314] Ibid. p. 26, para 15, I.2

[315] Ibid. p. 26, para. 15, I.4(b)

[316] Ibid. p. 27, para. 15, I.4(d)

[317] Ibid. p.29, para. 15, 1

[318] Ibid. p. 29 - 30, para. 15; 3, 7, 12

[319] Ibid. p. 29 - 30, para 15; 6, 8

[320] For a review of the 'trends' at the Law of the Sea Conference, See: Chapter 6

[321] Supra. n. 2, p. 38, para. 24

[322] Ibid. p. 41 - 42, para. 32 - 35

[323] Supra. n. 32

[324] Supra. n. 2, p. 47, para. 44

[325] Ibid. p. 54 - 55, para. 62 - 63

[326] Ibid. p. 57, para. 66

[327] Ibid. p. 58, para. 67

[328] Ibid. p. 59, para. 70

[329] Ibid. p. 60 - 61, para. 72

[330] Ibid. p. 61, para. 74

[331] Ibid. p. 61 - 62, para. 75

[332] Ibid. p. 63, para. 78

[333] Ibid. p. 63 - 64, para. 79

[334] Ibid. p. 64 - 66, para. 81 - 86

[335] Ibid. p. 66 - 69, para. 87 - 92

[336] Ibid. p. 70 - 71, para. 93 - 95

[337] Ibid. p. 71, para. 96

[338] Ibid. p. 72 - 75, para. 98 - 102

[339] Ibid. p. 77 - 78, para. 106 - 107

[340] Ibid. p. 75, para. 102; p. 77 - 78, para. 107

[341] Ibid. p. 79, para. 109

[342] Ibid. p. 79, para. 110

[343] Ibid. p. 82 - 83, para. 115

[344] Ibid. p. 84, para. 118

[345] Ibid.

[346] Ibid. p. 84 - 85, para. 119

[347] Ibid. p. 85, para. 121

[348] Ibid. p. 85, para. 120

[349] Ibid. p. 89, para. 129

[350] Ibid. p. 91, para. 130

[351] Ibid. p. 91, para. 131

[352] Ibid. p. 92, para. 132. See: Figure 7, for an illustration of the boundary delimited by the Court.

[353] Judges Ago, Schwebel, and Jimenez De Arechaga

[354] Judges Forster, Gross, Oda and Evensen

[355] Supra n. 2, p. 149, para. 11. See: p. 260 - 261, para. 165 - 166 per Judge Oda; and p. 294 - 296, para. 14 per Judge Evensen

[356] See: Ibid. p. 157, para. 1 per Judge Oda; and p. 296, para. 14 per Judge Evensen.

[357] Ibid. p. 99; See: also p. 150 - 151, para. 14 per Gross; cf. p. 271, para. 183(2) per Judge Oda

[358] Feldman, The Tunisia - Libya Continental Shelf Case; Geographic Justice of Judicial Compromise?, 77(1983) A.J.I.L. 219 at 238

[359] Ibid. p. 228

[360] Christie, From the Shoals of the Ras Kaboudia to the Shores of Tripoli: The Tunisia/Libya Continental Shelf Boundary Delimitation, 13(1983) Georgia Journal of International and Comparative Law, 1 at 23 - 24. For further discussion of the natural prolongation test; See: Chapter 7

[361] Ibid. p. 28; Op Cit. Feldman, p. 234

[362] Ibid p. 28

[363] Supra. n. 1

[364] See: Article 55, 76. United Nations Convention on the Law of the Sea, Supra n. 153

[365] For a general introduction to Canada - U.S. maritime boundaries, See: Alexander, The Nature of Offshore Boundaries, in, Canada - U.S. Maritime Problems, ed. Alexander and Hawkins, p. 56 - 62 (1972)

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[367] *See:* Treaty between the Government of the United States of America and the Government of Canada to submit to Binding Dispute Settlement the Delimitation of the Maritime Boundary in the Gulf of Maine Area, done in Washington on 29 March 1979, 10204 *T.I.A.S.*, p. 6 - 7; also, Nied, International Adjudication: Settlement of the United States - Canada Maritime Boundary Dispute, 23 (1982) *H.I.L.J.*, 138 - 143

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[369] Mills, Eastern Canada's Offshore resources and boundaries: a study in political geography, 6 (August 1971) *Journal of Canadian Studies*, 36 at 46

[370] Feldman and Colson, The Maritime Boundaries of the United States, 75(1981) *A.J.I.L.* 729 at 754 - 755

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[372] U.N. Doc. No. ST/LEG/SER. E/2, p. 624. Canada ratified the Convention on 6 February 1970

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[375] Supra. n. 372, p. 628. The United States objection was lodged on 16 July 1970

[376] 35 Federal Register 3301 (1970)

[377] In July 1970, December 1975 and February 1976; *See:* Op Cit. Buzan and Middlemiss, p. 41

[378] Order Prescribing as Fishing Zones of Canada Certain Areas of the Sea Adjacent to the Coast of Canada, 15 (1976) *I.L.M.* 1372. *See:* Press Statement, Secretary of State for External Affairs and the Minister of Fisheries and the Environment: November 2, 1976, 15(1977) *C.Y.I.L.* 328 - 329

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[380] United States, Department of State, Announcement on Maritime Boundaries Between the United States and Canada - 4 November 1976, 15(1976) *I.L.M.* 1453

[381] Ibid. p. 1436

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[383] Alexander and Norton, Maritime Problems between the U. S. and Canada, 20(Summer 1977) *Oceanus* 24 at 28, quoting from, Canadian Department of External Affairs, Canadian View of Gulf of Maine/Georgia Banks Boundry Line, Press Release of June 10, 1977

[384] Ibid.

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[386] United States, Department of State, Oceans - U.S. - Canada Interim Reciprocal Fisheries Agreement, June 2 - Department Statement, 78(August 1978) *D.S.B.* 38

[387] Supra. n.3.

[388] Department of External Affairs, Delimitation of Canada - U.S.A. Maritime Boundary in Gulf of Maine Area - Announcement of 15 September 1978, 17(1979) *C.Y.I.L.* 344 - 345

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[390] United States Department of State, Expanded Canadian Maritime Boundary Claim: Statement of 15 September 1978, 78(December 1978) *D.S.B.* 43; and, United States Department of State, Note to the Embassy of Canada at Washington, 20 September 1978, 73(1979) *A.J.I.L.* 132 - 133

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[393] See: Rhee, The Application of Equitable Principles to Resolve the United States - Canada Dispute over East Coast Fishery Resources, 21(1980) H.J.I.L. 667 at 673 - 676, 680 - 683; Rhee, Equitable Solutions to the Maritime Boundary Dispute Between the United States and Canada in the Gulf of Maine, 75(1981) A.J.I.L. 590 at 596 - 597; Law of the Sea: East Coast Treaty - notification of withdrawl from consideration by United States Senate, in, Canadian Practice in International Law during 1981: Parliamentary Declarations, 20(1982) C.Y.I.L. 323 - 324

[394] Supra. n. 367, p. 1

[395] See: Op Cit. Nied, p. 138

[396] Article II, Agreement between the Government of the United States of America and the Government of Canada to submit to a Court of Arbitration the Delimitation of the Maritime Boundary in the Gulf of Maine Area, done in Washington, on 29 March 1979, 10204 T.I.A.S., p. 11

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[398] See: Georges Bank Dispute, (September/October 1983) Supplement to International Perspectives 4; U.S. Submits Pleading to I.C.J. Concerning Canadian Maritime Boundary, 83 (August 1983) D.S.B. 58

[399] McRae, Adjudication of the Maritime Boundary in the Gulf of Maine, 17 (1979) C.Y.I.L. 282 at 301

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[405] Ibid. Rhee, p. 612

[406] Supra. n. 92

[407] *See:* Op Cit. Feulner, p. 92; Swan, p. 419 - 421

[408] Op Cit. Rhee, Equitable Solution to the Maritime Boundary Dispute Between Canada and the United States in the Gulf of Maine, p. 616 - 617

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[410] McRae, Proportionality and the Gulf of Maine Maritime Boundary Dispute, 19(1981) *C.Y.I.L.* 287 at 295. *See:* Op Cit. Rhee, Equitable Solutions to the Maritime Boundary Dispute Between Canada and the United States in the Gulf of Maine, p. 620

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[413] Ibid. p. 620

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[415] Ibid. p. 624 - 625

[416] Ibid. p. 625; *See:* Figure 8 for a map showing the alternative lines proposed by Rhee and the boundaries claimed by Canada and the U.S.

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[418] Op Cit. Wang, p. 4 - 5

[419] *See:* Decision of the Alaska Boundary Tribunal, October 20, 1903, *Proceedings of the Alaska Boundary Tribunal* (1904)

[420] Treaty between Great Britain and Russia, signed at St. Petersburg, 16 February 1825, 75(1825) *C.T.S.* 95

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[422] Bourne and McRae, Maritime Jurisdiction in the Dixon Entrance: The Alaska Boundary Re-Examined, 14(1976) *C.Y.I.L.*, 175 at 176

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[427] *See:* Green, Canada and Arctic Sovereignty, 48(1970) *Canadian Bar Review*, 740 - 775

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[429] Ibid. Article III

[430] Debates of the Senate of the Dominion of Canada, 1906-1907, (1907), p. 266 - 273

[431] For general discussion of this topic, *See:* Smedal, *Acquisition of Sovereignty over Polar Areas*, 54 - 76 (1931); McRae, Arctic Waters and Canadian Sovereignty, 38 (Summer, 1983) *International Journal*, 476 at 481 - 482

[432] Op Cit. Lawson, p. 241 - 242

[433] *See:* for a discussion of the Arctic Continental Shelf; Pharand, *The Law of the Sea of the Arctic*, 253 - 320(1973)

[434] *See:* Op Cit. Lawson, p. 244; cf. Ibid. p. 318

[435] *See:* Ibid. Lawson, p. 245; cf. Ibid. Pharand, p. 317

[436] See: Op Cit. McRae, Arctic Waters and Canadian Sovereignty, p. 483 - 485, 488 - 492

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[439] Symmons, The Canadian 200 - Mile Fishery Limit and the Delimitation of Maritime Zones around St. Pierre and Miquelon, 12(1980) Ottawa Law Review, 145 at 151.

[440] Op Cit. Beauchamp, Crommelin and Thompson, p. 443 - 445

[441] See: Supra. n. 3 para. 177, 200. Note: Symmons (Supra n. 439, p. 149) cites this as the only reference to the Agreement currently available.

[442] Ibid. Symmons, p. 149 - 151

[443] Supra. n. 378

[444] Results of discussions with France on extension by Canada of fishing zone to two hundred miles, House of Commons Debates, November 5, 1976 at 792 - 793, 15(1977) C.Y.I.L. 350 - 351

[445] Transitional French Fishing Vessel License Exemption Regulations, C.R.C. c. 414

[446] Decree No. 77 - 169 of 25 February 1977 (1977) J.O. 1102; See: Op Cit. Symmons, The Canadian 200-Mile Fishing Zone and the Delimitation of Maritime Zones Around St. Pierre and Miquelon, p. 154

[447] "Talks with France to continue on protracted fishing dispute." The Globe and Mail, May 10, 1984, p. 10

[448] Agreement between the Government of the Kingdom of Denmark and the Government of Canada relating to the Delimitation of the Continental Shelf between Greenland and Canada, signed at Ottawa on 17 December, 1973, in, Op Cit. Churchill and Nordquist - Vol. IV, p. 105 - 111

[449] Ibid. Article 1

[450] Ibid. Article VI. *See:* Op Cit. Butler, p. 224 - 225

[451] Supra. Chapter 2

[452] Article V, A, Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary between the United States and Mexico, done 23 November 1970, 7373 *T.I.A.S.*

[453] Ibid. Article V. B. *See:* Op Cit. Churchill and Nordquist - Volume Iv, 19 - 35; Butler p. 213 - 217

[454] Fishing Agreement between the United States of America and Mexico, Done at Mexico City on 24 November 1976; U.N. Doc. No. ST/LEG/SER. B/19, p. 430 - 436

[455] Treaty on Maritime Boundaries between the United States of America and the United Mexican States, done at Mexico City, 4 May 1978, in, *New Directions in the Law of the Sea, Documents - Volume VIII,* ed. Nordquist, Houston Lay and Simmonds, 68 - 65(1980)

[456] Article 1

[457] Op Cit. Feldman and Colson, p. 744. For further comment on the 1978 Mexico - U.S. Treaty, *See:* Schmitt, The Problems of Maritime Boundaries in U.S. - Mexican Relations, 22(1982) *Natural Resources Lawyer* 138 - 153; Szekely, A Commentary with the Mexican View on the Problem of Maritime Boundaries in U.S. - Mexican Relations, 22(1982) *Natural Resources Journal* 155 - 159

[458] Ibid. Feldman and Colson, p. 746

[459] Ibid.

[460] Maritime Boundary Agreement Between the United States of America and the Republic of Cuba, done at Washington, 16 December 1977, in, Op Cit. Nordquist, Houston Lay and Simmonds - Vol. VIII, p. 66 - 68

[461] Ibid. Article 1

[462] Op Cit. Feldman and Colson, p. 746

[463] Maritime Boundary Treaty between the United States of America and the Republic of Venezuela, done at Caracas on 28 March 1978, in, Op Cit. Nordquist, Houston Lay and Simmonds - Vol. VIII, p. 84 - 87. *See:* Feldman and Colson, p. 746 - 748

[464] *See:* Ibid. Feldman and Colson, p. 748 - 754, for *U.S.* boundaries with the Cook Islands, Tokelau, The Bahamas, The U.S.S.R. and in the Caribbean and the Pacific.

[465] Supra. n. 1

[466] Agreement delimiting the Continental Shelf Boundary between the Government of the Kingdom of Norway and the United Kingdom ofGreat Britain and Northern Ireland, signed in London on 10 March 1965, in, *New Directions in the Law of the Sea: Documents - Vol. 1*, ed. Houston Lay, Churchill and Nordquist, p. 120 - 121 (1973)

[467] Ibid. Article 1

[468] Ibid. Article 2(1)

[469] Ibid. Article 4

[470] North Sea Continental Shelf Boundaries. International Boundary Study, Series A, Limits in the Sea, No. 10, 2 March 1970, in, Ibid. p. 122. *See:* for a comment on the impact of the Norwegian Trough on this agreement, Op. Cit. Swan p. 418 - 421

[471] Agreement delimiting the continental shelf boundary between the Government of the Kingdom of Norway and the Government of the Kingdom of Denmark, signed in Oslo, 8 December 1965, in, Ibid. p. 123

[472] Agreement Concerning Sovereignty over Al-'Arabiyah and Farsi Islands and Delimitation of Boundary Line Separating Submarine Areas between the Kingdom of Saudi Arabia and Iran, signed at Tehran, 24 October 1968, 8(1969) *I.L.M.* 493 - 496

[473] Ibid. Article 1

[474] Ibid. Article 3(b)

[475] Young, Equitable Solutions for Offshore Boundaries: The 1968 Saudi Arabia - Iran Agreement, 64(1970) *A.J.I.L.*, 152 at 154

[476] Ibid. p. 155

[477] Agreement establishing a continental shelf boundary in the Adriatic Sea between the Governments of Italy and Yugoslavia, signed at Rome, 8 January 1968, in, Op Cit. Houston Lay, Churchill and Nordquist - Vol. I, p. 112 - 115

[478] Ibid. Article 1

[479] Ibid. Article 2

[480] Italy - Yugoslavia: Continental Shelf Boundary, International Boundary Study, Series A, Limits in the Sea, No. 9, 20 February 1970, in, Ibid, p. 115

[481] Ibid. p. 118

[482] Beagle Channel Arbitration: Report and Decision of the Court of 18 February 1977, 17(1978) *I.L.M.* 634

[483] For definition of 'internal waters' *See:* Article 5, Convention on the Territorial Sea and Contiguous Zone, U.N. Doc. No. A/CONF 13/L.52; Article 8, United Nations Convention on the Law of the Sea, U.N. Doc. No. A/CONF. 62/122

[484] *See:* Greig, The Beagle Channel Arbitration, 7 *A.Y.I.L.*, 332 at 332 - 333

[485] Supra. n. 482, p. 638, Article 1(1)

[486] Boundary Treaty between the Argentine Republic and Chile, signed at Buenos Aires, 23 July 1881, 159 (1881-1882) *C.T.S.* 45

[487] Supra. n. 482, p. 674, para. 176

[488] Op Cit. Greig, p. 382

[489] Ibid.

[490] The Agreement between Iceland and Norway of May 28, 1980, in, Continental Shelf Area Between Iceland and Jan Mayen, 62(1982) *I.L.R.* 108 at 111

[491] Ibid. Article 9

[492] Report and Recommendation to the Governments of Iceland and Norway by the Concilation Commission of 19 - 20 May 1981, 62(1982) I.L.R. 108 at 112 - 113. The Report is also reproduced in 20(1981) I.L.M. 797 - 842

[493] Draft Convention on the Law of the Sea (Informal Text), U.N. Doc. No. A/CONF. 62/WP.10/Rev. 3

[494] Ibid. Article 121(2)

[495] Ibid. Article 121(1)

[496] Supra. n. 492, p. 114

[497] 'Report of Geologists of 16 December 1980' in, Supra, n. 492, p. 115 - 121

[498] The Jan Mayen Ridge was described in the report as being: "...a roughly north - south trending feature with water depths between 200m and 1600m. It is subdivided by a depression, situated between latitude 68° and 69°N, into a northern plateau-like area and a southern zone.", in, Ibid. p. 117

[499] Ibid. p. 119

[500] Supra. n. 492, p. 124

[501] Ibid. p. 125

[502] Ibid. p. 126

[503] Ibid.

[504] Ibid.

[505] Ibid. p. 132

[506] Ibid. p. 133

[507] See: Chapter 7 for the current significance of islands in International Law

[508] See: Supra. n. 492, p. 127 - 134

CHAPTER 6

"THE 1982 UNITED NATIONS LAW OF THE SEA CONVENTION"

1. INTRODUCTION: THE 1974 CARACAS SESSION

In 1973 the United Nations General Assembly convened the Third United Nations Conference on the Law of the Sea[1], giving the Conference a mandate: "...to adopt a convention dealing with all matters relating to the law of the sea..."[2] The Conference opened with its first session on 3 December 1973[3] and ended with the adoption of the Law of the Sea Convention on 30 April 1982.[4] The Convention[5] includes 320 Articles and 9 Annexes and covers all those areas previously dealt with by the four 1958 Geneva Law of the Sea Conventions[6] plus the topic of the deep seabed, an issue which very nearly led to the collapse of the Conference, and still could jeopardize the future effectiveness of the Convention.[7] It is the purpose of this Chapter to review the Committee debates which took place during the ten years of the Conference in an effort to show why in 1981 it was only the neutral 'Koh proposal' which was acceptable to all parties. While the debates are, therefore, not of great significance in relation to the actual articles in the Convention dealing with maritime boundary delimitation between States, they do give an insight into the attitudes of certain states which is helpful in explaining why certain negotiating positions were adopted during boundary delimitations in the 1970's.

The Second Committee of the Conference was allocated the topics of the Territorial Sea, Continental Shelf and the Economic Zone and was asked to deal with the issue of the delimitation of these maritime boundaries between states.[8] It became apparent early on in the Conference that this issue of lateral delimitation was going to be a controversial one due to the various boundary disputes that existed during the 1970's[9] and the opportunity that the disputants were going to take during the Conference to present their case and try to gain support for their cause.

During the Plenary meetings of the Second Session of the Conference in 1974 some delegations took the opportunity to argue their cause. Tunisia argued that islands should be given full consideration at the Conference, noting that islands fell into the category of 'special circumstances' during delimitation negotiations, and that: "The determination of the maritime space of islands should take into full account the area of the island, its population, its contiguity to the principal territory, its geographical structure and configuration, and the special interests of island States and archipelagic States."[10] Turkey also made specific reference to islands in its opening statement noting the circumstances of its relationship with Greece in the Aegean Sea.[11]

(a) The Proposals before the Second Committee

The Second Committee during its opening sessions had twelve proposals before it dealing with the delimitation of maritime boundaries between opposite and adjacent states. Considering a cross-section of the delimitation techniques advocated in these draft articles, it can be seen that Turkey emphasized delimitation determined by agreement in accordance with equitable principles taking account of the respective coasts and the existence of islands, islets and rocks;12 the draft article submitted by Kenya and Tunisia proposed delimitation by agreement, in accordance with an equitable dividing line which would take special account of geological and geomorphological criteria;13 Japan advocated delimitation by agreement taking into account the principle of equidistance;14 while Ireland's draft article also advocated delimitation by agreement in accordance with equitable principles using the basis of the median line in the absence of 'special circumstances.'15

(b) The post-Conference Working Paper

While little actual debate took place in the Second Committee during this session, many delegates commented on either their proposed draft articles dealing with delimitation or those proposed by other countries.16 Following the Second Session of the Conference a working paper was released in October 1974 which reflected the main trends of the proposals before the Second Committee.17 Provision 21 dealt with the delimitation of the territorial sea between opposite and adjacent States and it contained four separate formulae. Formula A basically reflected the provisions of Article 12 of the 1958 Convention on the Territorial Sea and Contiguous Zone,18 Formula B provided that in the case of the parties not agreeing upon a boundary, then neither was entitled to extend its territorial sea beyond the median line. Formula C was the most comprehensive of the four provisions, providing for delimitation by agreement in accordance with equitable principles, with the parties being able to apply a combination of delimitation methods so as to take account of special circumstances. This Formula also made use of Article 33 of the United Nations Charter[19] as a means to resolve differences that could arise in the course of negotiations. Formula D provided that delimitation was to be based on the principle: "...of mutual respect for sovereignty and territorial integrity, equality and reciprocity."[20]

Provision 82 dealt with the delimitation of the lateral boundaries of the continental shelf, with the various Formulae providing:

Formula A(1) Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

Formula B(1). Where the coasts of two or more States are adjacent and/or opposite, the continental shelf areas appertaining to each State, shall be determined by agreement among them, in accordance with equitable principles.

Formula C(1). Where the coasts of two or more States are adjacent or opposite to each other, the delimitation of the boundary of the continental shelf appertaining to such States shall be determined by agreement between them, taking into account the principle of equidistance.

Formula D(1). The delimitation of the continental shelf or the exclusive economic zone between adjacent and/or opposite States must be done by agreement between them, in accordance with an equitable dividing line, the median or equidistance line not being necessarily the only method of delimitation.[21]

Formula A reflected the language of Article 6 of the Convention on the Continental Shelf and made the distinction between opposite and adjacent States. Both Formula B[22] and Formula D[23] emphasized the importance of a delimitation being in accordance with equitable principles or resulting in an equitable dividing line, while Formula C emphasized the equidistance/median line concept.[24] Of some interest is that these last three formulae combined the delimitation procedures for opposite and adjacent States in one provision, something which had not been done previously.[25]

With respect to the delimitation of the economic zone, a regime which had won wide support early on in the Conference,[26] Four Formulae were proposed - all of varying complexity. The Formula A[27] proposal generally provided that delimitation was to be carried out in accordance with international law, while Formula B[28] emphasized the need for the parties to agree upon a delimitation, failing which a median/equidistance line would be used. Formula C[29] also emphasized delimitation by agreement, using equitable principles which would take account of all relevant factors. Provision was also made for the resolution of differences between the parties by way of Article 33 of the Charter of the United Nations.[30] Finally Formula D[31] provided for delimitation in accordance with an equitable dividing line in which case geological and geomorphological criteria were to be considered.[32]

2. **THE I.S.N.T.**

As a consequence of the working papers drawn up after the Second Session and the debates at the Third Session in 1975, an Informal Single Negotiating Text[33] was released in May 1975. This Text, which was intended only to provide an informal basis for discussion, contained 3 Articles in Part II dealing with lateral delimitation. Article 13, which dealt with delimitation of the territorial sea, was identical to Formula A of Provision 21 in the 1974 Working Paper, while those articles dealing with the continental shelf and exclusive economic zone represented a combination of the features of the Formulae proposed in

1974.

Article 61, which dealt with the exclusive economic zone, provided that delimitation was to be: "...effected by agreement in accordance with equitable principles, employing, where appropriate, the median or equidistance line, and taking account of all relevant circumstances."[34] Provision was also made for a dispute settlement procedure, measures to be applied pending final settlement, definition of the median line, and the delimitation to refer to charts and geographic features as they existed at a particular date.[35] Article 70, the provision which dealt with continental shelf delimitation, contained provisions exactly the same as Article 61, and this began a trend which continued through the remainder of the Conference with the provisions dealing with the lateral delimitation of the continental shelf and the exclusive economic zone being identical.[36]

The significance of the I.S.N.T. Draft Articles on delimitation is that they represented one of the few compromises that occurred during those sessions of the Conference which took place in the 1970's with respect to delimitation techniques. It was noted that: "A degree of compromise had been reached in that negotiations, equity and all relevant circumstances had been balanced in both paragraphs 1 and 3 with reference to the equidistance principle. Paragraph 1 establishes that the principle may be applied where appropriate, but, more meaningfully, in paragraph 3 the equidistance line becomes the mandatory interim line in the absence of agreement."[37]

3. THE R.S.N.T. AND THE 1976 SESSIONS

The following year saw the issue of the Revised Single Negotiating Text[38], in which two minor alterations were made to the relevant draft articles. All of the articles had been split into two provisions so as to provide for the drawing of baselines on maps,[39] and a paragraph requiring the parties to make interim boundary arrangements during delimitation negotiations had been introduced.[40]

During the Fifth Session of the Conference in 1976, the Second Committee formed several negotiating groups whose purpose was to concentrate on those issues which were stalling the successful completion of the Committee's work.[41] Negotiating Group 5 dealt with maritime boundary delimitation and while it primarily worked on the basis of informal meetings, the one formal meeting that it did hold brought to the surface the essence of the dispute as to why the draft articles were unacceptable to many delegates. The discussion at the meeting: "...confirmed the fact that the central point at issue is the value to be attributed to the method involving the median or equidistance line in solving the problems connected with the delimitation of these maritime zones. Some delegations felt that this method should be given primary importance, while others thought that the problems should be solved in accordance with equitable princiles."[42] The Chairman of the Second

Committee remained confident that the Draft Articles of the R.S.N.T. would eventually bring about general agreement, noting that only certain delegations had real difficulties with the texts.[43]

4. THE 1977 SESSION

The Sixth Session of the Conference in 1977 saw little progress between the parties seeking a different delimitation formula in the Draft Articles. Consequently the only significant event was the issue by the Conference of the Informal Composite Negotiating Text,[44] which combined the work of all three Conference Committees into one draft text. The combining of all the draft provisions resulted in the alteration of the two Draft Articles dealing with the delimitation of the exclusive economic zone and the continental shelf. Paragraph 2 of both articles now provided: "If no agreement can be reached within a reasonable period of time, the State shall resort to the procedures provided for in Part XV of the present Convention"[45]

5. THE WORK OF NEGOTIATING GROUP 7

(a) The Formation of the Group in 1978

At the Seventh Session of the Conference in 1978 it was decided: "...to give priority to the identification and resolution of the outstanding core issues..."[46] which had plagued the Conference. One of these core issues was identified as being the delimitation of maritime boundaries between opposite and adjacent states and the settlement of disputes thereon.[47] Consequently this matter fell to be considered by Negotiating Group 7.

At the end of the Spring Session in 1978 the Chairman of the Group reported that there seemed to be widespread support within this Group of over 100 delegations for the retention of Article 15 in its I.C.N.T. form.[48] Accordingly the text of the article read: "Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest point on the baselines from which the breadth of the territorial seas or each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith."[49]

In the debates on paragraph 1 of Draft Articles 74 and 83, it was discovered that the division which had existed in Committee II's Negotiating Group 5 was also present in this Group. The Chairman identified the division as between those who supported the median or equidistance line as a delimitation principle, a Group which comprised 22 States, and those who advocated the use of equitable principles as a delimitation premise, which was made up of

29 States.[50] The Chairman commented that: "No compromise on this point did materialize during the discussions held, although one may note, that there appears to be general agreement as regards two of the various elements of delimitation: first, consensus seems to prevail, to the effect that any measure of delimitation should be effected by agreement, and second, all the proposals presented refer to relevant or special circumstances as factors to be taken into account in the process of delimitation."[51] The other issue of concern to the group was the dispute settlement procedure, with different positions being taken as to whether it was desirable to make such a provision compulsory."[52]

During the resumed Seventh Session of the Conference discussions continued in Negotiating Group 7. While no agreement could be reached with respect to the wording in paragraph one of Articles 74 and 83, the Chairman was able to identify four elements which were common to the two groups of States. He noted that the final paragraph should include: "(1) a reference to the effect that any measure of delimitation should be effected by agreement; (2) a reference to the effect that all relevant or special circumstances are to be taken into account in the process of delimitation; (3) in some form, a reference to equity or equitable principles; (4) in some form a reference to the median or equidistance line."[53] Points 3 and 4 were identified as being the major issues of controversy which faced the Group. It was also noted that while there had been no progress over the dispute settlement provision in the final articles,[54] a consensus had been reached to the effect that States should be obliged to make provisional agreements pending settlement of a boundary, and that such a provisional arrangement was to be without prejudice to the final delimitation.[55]

(b) Impasse in the Negotiating Group

The Eighth and Ninth Sessions of the Conference continued in a similar vein as before with very little progress being made in Negotiating Group 7 over the delimitation issue. While the Group's Chairman stated during a meeting of the Second Committee in April 1979 that 41 meetings of the Group had been held during the Seventh and Eighth Sessions:[56] "...he doubted whether, in view of the Group's lengthy deliberations and the controversies still prevailing, the Conference would be in a position to produce a provision that would offer a precise and definite answer to the question of delimitation criteria."[57] He then suggested, as a possible basis for compromise, a text which provided that delimitation was to be based on agreement: "...taking into account all relevant criteria and special circumstances in order to arrive at a solution in accordance with equitable principles, applying the equidistance rule or such other means as are appropriate in each specific case."[58] In the subsequent debate, the delegate from Spain, who was the co-ordinator of the Median/Equidistance Line

Group, agreed with the Chairman that none of the proposals before the Negotiating Group had succeeded in bringing about a consensus,[59] yet this Group was prepared to consider the Chairman's proposal.[60] The chairman of the Equitable Principles Group, the Irish delegate, rejected the Chairman's proposal for a neutral formula.[61]

No progress was made at the resumed Eighth Session in the Summer of 1979, with the opposing factions becoming more rigid in their negotiating positions. The Negotiating Group Chairman commented that: "...it became apparent that a consensus may not be based upon a 'non-hierarchical' formulation listing only the basic elements of delimitation, an alternative which earlier had seemed to have some support. Similarly, a concise formulation providing merely that the delimitation would be 'effected by agreement in accordance with international law' did not receive any particular sympathy from either side."[62]

As a result of the Ninth Session held in the Spring of 1980, the Chairman of Negotiating Group 7 announced in his report that a proposal had been put forward which included in the delimitation criteria a reference to international law forming the basis for any method of delimitation.[63] He noted that: "In order to elaborate this suggestion, the Chair proposed some new texts containing such a reference for consideration in both groups. One of the texts seemed to attract the interest of several delegations and was accordingly submitted to thorough examination by the groups."[64]

While this proposal of the Chairman did receive some support in the Plenary sessions of the Conference,[65] the traditional supporters of the median/equidistance line on the one hand[66] and of delimitation based on equitable principles[67] continued to pursue their cases and it once again seemed that the Conference was no closer to achieving consensus on this issue. Irrespective of the continuing division, when a Draft Convention on the Law of the Sea[68] was issued at the completion of the Resumed Ninth Session in August 1980, paragraph one of Draft Articles 74 and 83 provided that an agreement for the delimitation of the exclusive economic zone or continental shelf was to: "...be effected in conformity with international law."[69]

6. THE KOH PROPOSAL AND THE BREAKING OF THE DEADLOCK

During the Tenth Session of the Conference in the Spring of 1981, there was some indication that progress was being made in the negotiations,[70] but no acceptable delimitation formula had been agreed upon at the end of the Session. At a Plenary meeting of the Conference during the resumed Tenth Session in August 1981, the President of the Conference, Mr. Koh of Singapore, announced that after consultations with the chairman of the two groups in Negotiating Group 7 a proposal for a solution to the deadlock in the Group had been put forward which seemed to enjoy widespread support.[71] Immediately following this statement the 'Koh proposal' was supported by the Irish[72] and Spanish[73] delegates, this action by the 'Chairmen' of the two disputing groups within Negotiating Group 7 effectively ending the deadlock which had existed since 1978. Though many delegates wished to reserve their comments on the 'Koh proposal' until the next session of the Conference[74], there was wholehearted support from fifteen delegates[75] and it seemed that the tide had turned and a compromise solution suitable to most delegates had been found.

7. THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

When the Law of the Sea Convention was adopted on 30 April 1982, Articles 74 dealing with the Exclusive Economic Zone, and Article 83 dealing with the Continental Shelf contained identical provisions which, in the case of Article 74 provided that:

1. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV
3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter

> into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.
>
> 4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.[76]

Article 15 of the Convention, which provides for the delimitation of the territorial sea between opposite and adjacent States, is identical to that which Negotiating Group 7 approved in 1978.[77]

8. ANALYSIS OF THE CONVENTION

Since Article 15 of the 1982 Convention is very similar to Article 12 of the 1958 Convention on the Territorial Sea and Contiguous Zone[78] it seems that those States who are parties to both Conventions will not have to alter their delimitation techniques significantly as they extend their territorial sea to the now accepted limit of 12 miles.[79] Consequently this provision in the Convention will not have that great an impact on the current law. Therefore, it is the provisions found in Articles 74 and 83 which have come in for the most post-Conference comment, especially since they represent a significant departure from the provisions contained in the 1958 Convention.[80]

Oxman has noted that while the text of these two Articles did achieve the goal of attaining agreement between the different groups at the Conference, the effect of eliminating the reference to 'equidistance' was to limit: "...the entire provision to a rule of delimitation by agreement that does not, as such, purport to lay down a normative rule to be applied in the absence of agreement. In return, they changed the reference to 'equitable principles' to a vaguer notion that agreements should achieve an 'equitable solution'."[81]

A Canadian observer noted that with respect to the final result of the debate within Negotiating Group 7: "On the face of things, the battle of doctrines ended in a draw. The truth is, of course, the doctrinal or philosophical differences had less to do with the controversy than the variety of geographical situations addressed by the delegations, each in their own national interest. Accordingly, the language of Articles 74 and 83 should be regarded as designed, in the final version, as intended to facilitate, rather than to guide negotiations, and to ensure maximum flexibility in the disposition of boundary delimitation issues within the dispute settlement system provided for in Part XV on the Convention."[82]

The reference in the final articles to the Statute of the International Court[83] has been criticized by a British commentator, who interpreted this reference to mean: "...that the process of delimitation must be conducted in the light of the principles that have been evolved by international law and that, for this purpose, international law must be understood in a special extended sense to include not only fully formal international law but also the material found in the formative sources of international law (such as prenormative state practice, judicial decisions, general principles of law). What the Convention does is to set the parameters of the delimitation process. Those parameters are finite in number and kind but not wholly specific. They are not wholly specific, but they are totally exclusive."[84] He goes on to describe the inclusion of the term 'equitable solution' in the final Articles: "...as an avoidance tactic, so that, in the interest of fairness between the two parties most concerned (the Median Line Group and the Equitable Principles Group), references to both the shibboleth concepts could be omitted from the final text."[85]

From the above review, it can be seen that the difficulties which were encountered at the Third United Nations Conference on the Law of the Sea in coming to agreement over the delimitation principles to be used in the drawing of lateral boundaries in the continental shelf and exclusive economic zones, were representative of the split among the world community between those who favoured the Median/Equidistance line as a basis of delimitation and those preferring delimitation based on equitable principles. Since it seems that the provisions in the 1982

Law of the Sea Convention were only agreed upon as a compromise, there is no certainty that those provisions will be adhered to in the future. This uncertainty is made even more acute due to the concern which exists over the whole future of the Convention and whether it will ever come into force and be an effective instrument for the determination of many law of the sea issues and disputes which currently affect the world.[86] In the next chapter the effect of the Convention will be studied in conjunction with the customary law of boundary delimitation so as to determine the current state of the law.

FOOTNOTES

1 Resolution 3067 (XXVIII). The Law of the Sea Conference will hereafter be referred to as U.N.C.L.O.S. III

2 Ibid. para. 3

3 U.N. Doc. No. A/CONF. 62/SR 1

4 U.N. Department of Public Information, Press Release SEA/494, at 1(April 30, 1982). The vote was 130 to 4 with 17 abstentions. The four States voting against the Treaty were Israel, Turkey, the United States of America and Venezuela. See: Sea Law: Their Reasons Why, 19(June 1982) U.N. Chronicle, p. 16 - 22; especially p. 22 where the delegate from Venezuela noted that his country: "...could not accept provisions on the delimitation of marine and submarine areas between States with opposite or adjacent coasts."

5 United Nations Convention on the Law of the Sea, U.N. Doc. No. A/CONF. 62/122; reprinted in U.N. Convention on the Law of the Sea., ed. Simmonds (1983)

6 Supra. Chapter 4. See: U.N. Doc. No. A/CONF. 13/L 52 - Convention on the Territorial Sea and Contiguous Zone (reprinted in 516 U.N.T.S. 205); U.N. Doc. No. A/CONF. 13/L 53 - Convention on the High Seas (reprinted in 450 U.N.T.S. 82); U.N. Doc. No. A/CONF. 13/L 54 - Convention on Fishing and Conservation of the Living Resources of the High Seas (reprinted in 599 U.N.T.S. 285); U.N. Doc. No. A/CONF. 13/L 55 - Convention on the Continental Shelf (reprinted in 499 U.N.T.S.311)

7 See: Op Cit. Simmonds, p. xiii - xix; Ratiner, The Law of the Sea: A Crossroads for American Foreign Policy, 60(1982) Foreign Affairs, 1006 - 1021; Pardo, The Convention on the Law of the Sea: A Preliminary Appraisal, 20(1983) S.D.L.R., 489 at 499 - 501

8 Item 2, 5, 6, Statement of the Work of the Second Committee, U.N. Doc. No. A/CONF. 62/C. 2/L.85

9 Supra. Chapter 5, especially Parts 2, 3, 6, 7, 8

10 U.N. Doc. No. A/CONF. 62/SR. 37, p. 11 per Mr. Kedadi

11 U.N. Doc. No. A/CONF. 62/SR. 39, p. 28 - 39 per Mr. Yolga, *See:* Chapter 5 for a thorough discussion of the dispute between Greece and Turkey in the Aegean Sea.

12 U.N. Doc. No. A/CONF. 62/C.2/L.9

13 U.N. Doc. No. A/CONF. 62/C.2/L.28

14 U.N. Doc. No. A/CONF. 62/C.2/L.31/Rev. 1

15 U.N. Doc. No. A/CONF. 62/C.2/L.43. *See:* also, U.N. Doc. No. A/CONF. 62/C.2/L.14 (Netherlands), L.18 (Romania), L.22 (Greece), L.23 (Turkey)

16 *See:* generally, U.N. Doc. No. A/CONF. 62/C.2/SR. 16 - 28

17 Main Trends (Second Committee), U.N. Doc. No. A/CONF. 62/C.2/WP.1

18 Supra. n. 6

19 *See:* Chapter VI, Pacific Settlement of Disputes, *Charter of the United Nations*, in, U.N. Publication DPI/511

20 Supra. n. 17, Provision 21 - Formula D

21 Ibid. Provision 82

22 Based on the submission by Turkey, Supra. n. 12

23 Based on the submission by Kenya/Tunisia, Supra. n. 13

24 Based on the submission by Japan, Supra. n. 14

25 *See:* Hodgson and Smith, *Boundaries of the Economic Zone*, in, *Law of the Sea: Conference Outcomes and Problems of Implementation*, ed. Miles and Gamble, 193 - 195 (1977)

26 Supra n. 17, Provision 88, 90

27 Ibid. Provision 116. Based on the submission by Algeria and others

28 Ibid. Based on the proposal by Greece

29 Ibid. Based on the proposal by Turkey

30 Supra. n. 19

31 Supra. n. 17, Provision 116. Based on the submission by Kenya/Tunisia

32 *See:* Op Cit. Hodgson and Smith, p. 195 - 197; Butler, Boundary Delimitation in the Economic Zone: The Gulf of Maine Dispute, 30(1979) *Maine Law Review*, 207 at 226 - 228

33 U.N. Doc. No. A/CONF. 62/WP.8 Hereafter referred to as 'I.S.N.T.'

34 Ibid. Article 61(1)

35 Ibid. Article 61(2) - (6)

36 *See:* Op Cit. Hodgson and Smith, p. 197 - 199

37 Ibid. p. 198. For a review of the 1975, Third Session of the Conference held in Geneva, *See:* Stevenson and Oxman, The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session, 69(1975) *A.J.I.L.*, 763 - 797

38 Revised Single Negotiating Text, U.N. Doc. No. A/CONF. 62/WP.8/Rev.1. Hereafter referred to as 'R.S.N.T.'

39 Ibid. Part II, Articles 15, 63 and 72

40 Ibid. Articles 62(3) and 71(3). *See:* Op Cit. Hodgson and Smith, p. 200

41 Report by Mr. Andres Aguiler M., Chairman of the Second Committee, on the work of the Committee, U.N. Doc. No. A/CONF. 62/L.17, p. 11 - 13

42 Ibid. p. 46

43 Ibid. p. 46, 47. See: for a review of the work of the 4th and 5th Sessions held in New York in 1976; Oxman, The Third United Nations Conference on the Law of the Sea: The 1976 New York Sessions, 71(1977) A.J.I.L., 247 - 269

44 Informal Composite Negotiating Text, U.N. Doc. No. A/CONF. 62/WP 10. Hereafter referred to as ' I.C.N.T.

45 Ibid. Articles 74(2) and 83(2). For those articles dealing with dispute settlement, See: Ibid. Articles 279 - 297, also, for a review of the work of the Sixth Session held in New York in 1977, See: Oxman, The Third United Nations Conference on the Law of the Sea: The 1977 New York Session, 72(1978) A.J.I.L., 57 - 83, especially 79.

46 Report of the General Committee on the organization of the work of the Seventh Session, U.N. Doc. No. A/CONF. 62/61, II.1

47 Ibid. II.5(7)

48 Report by the Chairman of Negotiating Group 7 on the Work of the Group - Article 15, in, Reports of the Committees and Negotiating Groups on negotiations at the seventh session contained in a single document both for the purposes of record and for the convenience of delegations, U.N. Doc. No. A/CONF. 62/RCNG/1

49 Ibid.

50 Ibid. Articles 74/83, paragraph 1. The submission of the Median/Equidistance Line Group is found in U.N. Doc. No. NG7/2 in which paragraph 1 provided: "The delimitation of the Exclusive Economic Zone Continental Shelf ,between adjacent or opposite States shall be effected by agreement employing, as a general principle, the median or equidistance line, taking into account any special circumstances where this is justified." The submission of the Equitable Principles Group is found in NG7/10 in which paragraph 1 provided: "The delimitation of the exclusive economic zone (or continental shelf) between adjacent or/ and opposite States shall be effected by agreement, in accordance with equitable principles taking into account all relevant circumstances and employing any methods, where appropriate, to lead to any equitable solution."

51 Ibid.

52 Ibid. Articles 74/83, paragraph 2 and Article 197, sub-paragraph 1(a). See: For a discussion of the work of Negotiating Group 7 at the Geneva-Spring 7th Session in 1978; Adede, Toward the Formulation of the Rules of Delimitation of Sea Boundaries Between States with Adjacent or Opposite Coasts, 19(1979) Va. J.I.L., 207 at 209 - 224

53 Report by the Chairman of Negotiating Group 7 on the work of the Group at its 17th - 27th meetings, U.N. Doc. No. NG7/24, p. 2

54 Ibid. p. 2 - 3. See: for a discussion of this issue; Bernhardt, Compulsory Dispute Settlement in the Law of the Sea Negotiations: A Reassessment, 19(1979) Va.J.I.L., 69 at 95 - 98

55 Supra. n. 52, p. 2. See: for an assessment of the Negotiating Group's Work in 1978; Op Cit. Adede, p. 224 - 236, and, Oxman, The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978), 73(1979) A.J.I.L., 1 at 22 - 24.

56 U.N. Doc. No. A/CONF. 62/C.2/SR. 57, p. 26 per Mr. Manner.

57 Ibid. p. 30

58 Ibid. p. 31

59 Ibid. p. 56 per Mr. Lacleta

60 Ibid. p. 57

61 Ibid. p. 78 - 79 per Mr. Hayes

62 Report of the Chairman of Negotiating Group 7, U.N. Doc. NG7/45. See: for an assessment of the Negotiating Group's work in 1979; Op Cit. Adede, p. 236 - 252; Oxman, The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979), 74(1980) A.J.I.L., 1 at 29 - 32

63 Report of the Chairman of Negotiating Group 7, U.N. Doc. No. A/CONF. 62/L. 47, p. 4

64 Ibid.

65 See: U.N. Doc. No. A/CONF. 62/SR. 125, p. 32 per Mr. Dreher (Federal Republic of Germany); U.N. Doc. No. A/CONF. 62/SR. 126, p. 98 per Mr. Andreasen (Denmark); Ibid. p. 123 per Mr. Kerden (Iran); U.N. Doc. No. A/CONF. 62/SR. 127, p. 7 per Mr. Perisie (Yugoslavia); Ibid. p. 8 per Mr. Freer-Jiminez (Costa Rica); Ibid. p. 42 per Mr. Cherry Semper (Colombia); U.N. Doc. No. A/CONF. 62/SR. 128, p. 99 per Mr. Al Haddad (Democratic Yemen)

66 See: U.N. Doc. No. A/CONF. 62/SR. 126, p. 24 per Mr. Ibanez (Spain); U.N. Doc. No. A/CONF. 62/SR. 127, p. 29 per Mr. Mizzi (Malta)

67 See: U.N. Doc. No. A/CONF. 62/SR. 126 per Mr. Hayes (Ireland); Ibid. p. 88 per Mr. De La Guardio (Argentina); Ibid. p. 137 per Mr. Falcon Briceno (Venezuela); U.N. Doc. No. A/CONF. 62/SR 127 p. 37 per Mr. Yolga (Turkey); Ibid. p. 65 per Mr. Symonides (Poland); Ibid. p. 74 per Mr. de Lacharriere (France); Ibid. p. 94 per Mr. Ghellali (Libyan Arab Jamahiriya); U.N. Doc. No. A/CONF. 62/SR. 128 p. 114 per Mr. Sene (Senegal); Ibid p. 162 per Mr. Kasanga Mulwa (Kenya); Ibid. p. 188 per Mr. Guchi (Ivory Coast); Ibid. p. 227 per Mr. Mesloub (Algeria)

68 Draft Convention on the Law of the Sea (Informal Text), U.N. Doc. No. A/CONF. 62/WP. 10/Rev. 3

69 Ibid. See: for a discussion of the work in Negotiating Group 7 during the 9th Session in 1980; Oxman, The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980), 75 (1981) A.J.I.L. 211 at 231 - 233

70 See: U.N. Doc. No. A/CONF. 62/SR. 148, p. 81 per Mr. Lacleta Munroz (Spain)

71 U.N. Doc. No. A/CONF. 62/SR. 154, p. 1 - 3; the 'Koh proposal' was the delimitation formula eventually adopted in paragraph 1 of Articles 74 and 83, See: Infra. n. 76

72 Ibid. p. 4 per Mr. Hayes

73 Ibid. p. 5 per Mr. Lacleta Munoz.

74 See: Ibid. p. 9 per Mr. Malone (United States of America), p. 10 per Mr. Shen (China), p. 11 per Mr. Humaiden (United Arab Emirates), p. 19 per Mr. Pinto (Portugal), p. 20 per Mr. Morales Paul (Venezuela), p. 32 per Mr. Al Jufairi (Qatar), p. 34 per Mr. Foroten (Peru), p. 35 per Mr. Fodha (Oman), p. 37 per Mr. Al-Awadhi (Kuwait), p. 40 per Mr. Shash (Egypt), p. 41 per Mr. Al-Haddad (Bahrain), p. 43 per Mr. Rosenne (Israel)

75 See: p. 12 per Mr. Muntasser (Libyan Arab Jamahiriya), p. 17 per Mr. Nasinvosky (Union of Soviet Socialist Republics), p. 22 per Mr. Yenkov (Bulgaria), p. 28 per Mr. Wisnoemoerti (Indonesia), p. 29 per Mr. Daoudy (Syrian Arab Republic), p. 31 per Mr. Goerner (German Democratic Republic), p. 33 per Mr. Arias Schreiber (Peru), p. 36 per Miss Ainum (Malaysia), p. 38 per Mr. Cherry Semper (Colombia); p. 39 per Mr. Muslim (Kenya), p. 44 per Mr. Zinchenko (Ukranian Soviet Socialist Republic), p. 46 per Mr. Sene (Senegal), p. 47 per Mr. Koffi (Ivory Coast)

76 Supra. n. 5

77 Ibid. See: Supra n. 49

78 Supra. n. 6; For a comparison of the problems associated with acceptance of Article 12 in 1958, See: Supra. Chapter 4, Part 3

79 Ibid. Article 3. See: Johnston, Maritime Boundary Delimitation and U.N.C.L.O.S. III, in, International Symposium on the New Law of the Sea in Southeast Asia: Developmental Effects and Regional Approaches, 142(1983), and Allott, Power Sharing in the Law of the Sea, 77(1983) A.J.I.L., 1 at 19 - 20

80 See: Supra. n. 6 Article 6, Convention on the Continental Shelf

81 Oxman, The Third United Nations Conference on the Law of the Sea: The Tenth Session (1981), 76(1982) A.J.I.L., 1 at 14 - 15

82 Op Cit. Johnson, p. 143

83 Article 38, Statute of the International Court of Justice, in, U.N. Publication Sales No. DPI/511

84 Op Cit. Allott, p. 22 - 23. *See:* for a discussion of the role that custom plays in the law of the sea; McRae, Customary International Law and the United Nations Law of the Sea Treaty, 13(1983) *California Western International Law Journal*, 181 at 197 - 204

85 Ibid. p. 23

86 *See:* Grolin, The Future Law of the Sea: Consequences on a Non-Treaty or Non-Universal Treaty Situation, 13(1983) *Ocean Development and International Law*, 1 - 31

CHAPTER 7

THE PRINCIPLES AND TECHNIQUES USED IN MARITIME BOUNDARY DELIMITATION BETWEEN STATES AND THE CURRENT STATE OF THE LAW

Now that the development of the law of maritime boundary delimitation between opposite and adjacent States has been outlined from its origins to the 1982 Law of the Sea Convention, it is possible to make some determinations regarding the current state of the law and the principles of delimitation which are to be used in boundary negotiations. To begin this assessment it is necessary to review all of the major cases and treaties previously referred to so as to determine the current importance of those principles and delimitation techniques used in earlier times.

1. A REVIEW OF THE LAW AS IT DEVELOPED: THE MAJOR INFLUENCES

It was not until those parts of the seas over which coastal states claimed sovereignty or jurisdiction began to encroach upon similarly claimed zones of opposite or adjacent states that the problem of how to delimit these overlapping boundaries began to arise. In the days before the development of the territorial sea, some states claimed jurisdiction up to the 'middle of the seas' or the 'mid-line'[1], but with the unilateral declaration of various fishing zones in the Nineteenth Century it became necessary for a method to be developed to determine the direction of the boundary drawn in the sea. The use of the term 'middle of the channel' in the 1846 Boundary Treaty between the

United States and Great Britain[2] was found to be too imprecise a term and eventually the boundary was decided upon by an Arbitration Tribunal[3] which delimited the boundary in more exact terms.

While states continued to delimit their maritime boundaries in imprecise terms during the early years of the Twentieth Century, the real breakthrough in the development of the law was the 1909 Grisbadarna Arbitration.[4] While the decision of the Court was ostensibly to draw a line perpendicular to the general direction of the coast, equity was also taken into consideration. A modern commentator has noted: "Although the tribunal did not state that it was applying equity as a matter of law, its application of the principle of a line perpendicular to the general direction of the coast as lex proprio motu resulted from the equitable consideration of the 'circumstances of fact', and was firmly based on the conviction that the decision must be equitable."[5]

(a) The 1958 Law of the Sea Conventions

While the 1930 Hague Conference was of minor significance to the development of the law of the sea, the four 1958 Geneva Conventions constitute a milestone in the history of the law. The Geneva Conference was influenced to a great extent by three factors. The first was the 1945 Truman Proclamation, in which President Truman of the United States not only claimed jurisdiction over the adjacent continental shelf but also asserted that maritime boundaries shared by the United States with other countries were to be determined: "...in accordance with equitable principles."[6] The pioneering work of S. Whittemore Boggs on maritime boundaries was the second influential factor.[7] Writing on the delimitation of the territorial sea and continental shelf, Boggs was one of the first to define the 'median line' as a principle suitable for use in the drawing of maritime boundaries. Such a line was defined as being: "...the line every point of which is equidistant from the nearest point or points on opposite shores."[8]

The third factor which had an impact on the First Law of the Sea Conference, and arguably the most influential, was the 1956 report of the International Law Commission[9] in which three of the seventy-two draft articles dealt with the delimitation of maritime boundaries between States.[10] While the Commission proposed delimitation by agreement, it also recommended the median/equidistance line as the basic principle upon which delimitation be based. The Commission favoured the flexibility of such a line, noting that: "Where the coast is straight, a line drawn according to this method will coincide with one drawn at right angles to the coast at the intersection of the land frontier and the coastline. If, however, the coast is curved or irregular, the line takes the contour into account, while avoiding the difficulties of the problem of the general direction of the coast."[11] The Commission also recommended that 'special circumstances' should be taken into consideration by the parties.

As a consequence of these factors, when the 1958 Conference met there was relatively little dissention among the delegates as to how the articles dealing with delimitation between States should be drafted. While there was some debate over the inclusion of the 'special circumstances' exception, the median/equidistance line was generally accepted so that the provisions of both the Convention on the Territorial Sea and Contiguous Zone[12] and the Convention on the Continental Shelf[13] included the concept that delimitation should be by way of agreement, using an equidistance line unless another was justified by 'special circumstances'. But while the equidistance principle had gained prominence at this time, there were inherent difficulties involved in its application. "Originally, the equidistance principle was applied to lakes, rivers, and territorial waters, that is to say, to relatively small areas, and mostly in order to delimit maritime boundaries between states whose coasts were 'opposite' each other. The reason why the rule seemed appropriate in such cases was twofold: It attributed to each of the countries involved the areas which were nearest to its shores; and it divided them equally between the parties. The former element is still present, but the latter is totally absent when the rule of equidistance is applied to determine lateral boundaries; and its unequal effects are further aggravated where continental shelf frontiers have to be drawn, because the areas to be divided are larger."[14]

(b) The North Sea Continental Shelf Case

The International Court came to a similar conclusion as that noted above in the North Sea Continental Shelf Cases[15] when it held that the equidistance line was not an appropriate method of delimitation to be used when the concave nature of the coastline caused one of the states to be awarded a disproportionate share of the continental shelf.[16] While the decision did not directly deal with the impact of the 1958 Convention on the Continental Shelf, this was the first opportunity that the International Court had to deal with a maritime boundary delimitation dispute. Consequently its award based on the customary law of the day is of great importance. While the Court did outline natural prolongation, the configuration of the coast, and proportionality as being relevant factors for the parties to consider in this case,[17] it made the point that: "...there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing - up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case."[18] The emphasis of the court on the need to consider all the relevant circumstances and to delimit the boundary using equitable principles was the first time these factors had affirmatively been taken note of by the Court.

(c) The 1977 Anglo-French Arbitration

The 1977 Anglo-French Arbitration[19] saw a mixture of customary and treaty law applied due to France's reservation regarding the application of Article 6 of the Convention on the Continental Shelf in the Granville Bay-Channel Islands region. While the case is significant due to the enclave solution adopted for the Channel Islands and the 'half-effect test' used for the Scilly Islands,[20] the statements made on the general principles of delimitation were of greater interest. The determination by the Court that the rule in Article 6 was a joint special circumstances - equidistance rule,[21] rather than one based on equidistance with special circumstances the exception, was a new interpretation of the provision. The Court noted that the equidistance line was only applicable in those cases where there were no geographical features which created inequity or where 'special circumstances' existed.[22] With respect to the application of the median/equidistance line and the goal to be reached when delimitation takes place, it was noted that: "...where the coastlines of two opposite States are themselves approximately equal in their relation to the continental shelf not only should the boundary in normal circumstances be the median line but the areas of shelf left to each Party on either side of the median line should be broadly equal or at least broadly comparable."[23]

(d) The Tunisia-Libyan Continental Shelf Case

The 1982 decision of the International Court of Justice in the Tunisia-Libya Continental Shelf Case[24] is the most recent case from which an analysis of the current law can be taken. While the Court emphasized the individuality of each particular case,[25] it again referred to the influence that equity has on the delimitation process: "The principles to be indicated by the Court have to be selected according to their appropriateness for reaching an equitable result. From this consideration it follows that the term 'equitable principles' cannot be interpreted in the abstract: it refers back to the principles and rules which may be appropriate in order to achieve an equitable result."[26] After holding that the equidistance rule is neither mandatory nor has a privileged status,[27] the Court delimited the boundary on the basis of a 'de facto' offshore boundary line that had been respected by the parties,[28] and a 'half-effect' line which diminished the impact of the Kerkennah Islands and resulted in a proportional delimitation.[29]

(e) Cases which involve 'unusual' geographical features

While a modified equidistance line was successfully used in the Torres Strait,[30] more often the use of such a line has led to disputes between the parties which have stalled delimitation agreements. It seems that an equidistance line will rarely be able to equitably account for all the various geographical factors unless the parties agree to modify the direction of the line. As was shown in the case of the Iran - Saudi Arabia Agreement,[31] the United Kingdom - Norway Agreement[32] and the Agreement between Italy and Yugoslavia[33], the parties must be either prepared to depart from the use of the equidistance line or ignore special geographical features, or otherwise disputes will arise such as in the Gulf of Maine, the Timor Sea, and the Yellow and East China Sea.

(f) The 1982 Law of the Sea Convention[34]

When the debates which took place at the Law of the Sea Conference are reviewed in light of the various boundary disputes that existed in the 1970's, it is understandable why there was such a large gulf between the States supporting delimitation by equitable principles and those supporting the median/equidistance line. While it is not the purpose of this paper to delve into the politics of the Law of the Sea Conference, the compromise Koh Formula was the only proposal which could possibly have gained the support of both disputing groups at the Conference due to it being worded so that it did not directly refer to either delimitation technique and yet allowed both principles to be considered.[35] What then will be the impact of the provisions in the Convention dealing with boundary delimitation between States? As noted[36] the provisions of Article 15 are so similar to those contained in the 1958 Convention on the Territorial Sea and Contiguous Zone that they will have little or no impact, consequently it is the provisions in Article 74 and 83 dealing with continental shelf and exclusive economic zone delimitations which are of the greater significance. Yet one distinguished observer of the Conference debates noted: "Without taking a position on the eventual 'success' or 'failure' of this Conference, it would appear that the outcome will not prove vital for the present and future practices and problems of maritime delimitation. It is basic to the issue that certain fundamental elements of international law have already been laid down and that these have strong support in the practice of States - the single most important constituent in the development of 'customary' international law."[37]

Upon careful scrutiny of the provisions in Articles 74 and 83 it can be seen that they represent little change from the current customary law on the subject. Delimitation by agreement was endorsed by the 1958 Law of the Sea Conventions and was generally upheld by State practice during the years between the two Conventions so that it could now be said to be part of customary international law. With respect to the reference to Article 38 of the Statute of the International Court of Justice,[38] which refers to international conventions, international custom, judicial decisions and the teachings of the most highly qualified publicists as being 'sources' of international law, none of these factors will introduce a contrary influence to the law of maritime boundary delimitation which built up in the years prior to the

Conventions and is best represented by the 1982 Tunisia-Libya Continental Shelf Case. Finally, the requirement of the need for the parties to reach an equitable solution is also no new concept, this being an underlying factor in all three Court decisions discussed and was explicitly referred to in the 1982 decision of the International Court.[39]

Consequently, irrespective of whether the 1982 Law of the Sea Convention comes into effect[40] or whether the Treaty is only ratified by a few countries,[41] it will have virtually no impact on the law of the sea dealing with the delimitation of maritime boundaries between states. All the Convention does in Articles 74 and 83 is refer back to the law as it developed prior to and since the Convention. That will not be reviewed.

2. TECHNIQUES USED IN MARITIME BOUNDARY DELIMITATION

(a) The median/equidistance line

As pointed out earlier,[42] while the median/equidistance line principle was the dominant method of delimitation in the 1958 Law of the Sea Conventions, it has subsequently been relegated into a position where it is now only one of the many delimitation techniques which the parties or a court can consider during the delimitation process. Indeed the International Court noted in 1982 after a review of the 1958 Conventions and its 1969 decision, that: "Treaty practice, as well as the history of Article 83 of the draft convention on the Law of the Sea leads to the conclusion that equidistance may be applied if it leads to an equitable solution, if not, other methods should be employed."[43] While the Court went on to note that equidistance is not a mandatory principle,[44] a recent study has shown that: "In some situations, an equitable division may best be effected through application of the equidistance method; in other instances, that is not the case. Equidistance often provides a starting point for negotiations but may subsequently be modified or abandoned completely."[45] This was the case with the boundary drawn through the Torres Strait, between Mexico and the United States in the Gulf of Mexico and the Pacific Ocean, and between Italy and Yugoslavia in the Adriatic. The boundary drawn in the English Channel and out into the Atlantic between England and France was also an equidistance line, being modified by the half-effect test to account for the prolongation of the Scilly Islands, and the second segment of the boundary between Tunisia and Libya was modified to account for the Kerkennah Islands.

(b) Agreement

One principle which has been reinforced by the 1982 Convention is that the parties attempt to agree on their maritime boundary rather than for the matter to be determined by unilateral declaration or third party settlement. While the 1982 Convention does provide for the resolution of unresolved boundaries through a dispute settlement procedure,[46] the emphasis continues to be on bi-lateral or multi-lateral negotiation or agreement. One commentator has noted that: "... to my knowlege no boundary dispute over marine jurisdiction has led to armed conflict. Certain levels of tension have occured as a consequence of the administration of jurisdiction in disputed zones. These issues, however, have been controlled and have remained at a relatively low level. This fortunate condition may stem from the noted different reactions to questions of sovereignty v. jurisdiction or from the very nature of the occupancy of maritime space. In either event - or for other reasons - maritime boundary disputes have either been settled peacefully or they have continued for prolonged periods without incurring active hostilities between States. This state of affairs appears to be the most encouraging aspect of maritime boundary delimitation problems. It provides a sharp contrast to the history of land frontier confrontations."[47] It seems clear from the cases previously reviewed, that even when the parties adopt completely opposite standpoints in their arguments regarding the placement of maritime boundaries, they will feel compelled by the weight of international law and custom to begin negotiations over the matter in an attempt to settle the dispute.[48]

(c) Equitable solution

It has already been noted that the two most recent sources of the law in this area reinforce the need for the parties to arrive at an equitable solution. This is the result sought by both Articles 74 and 83 of the Law of the Sea Convention and was a primary goal of the International Court in the Tunisia-Libya Continental Shelf Case.[49]

(d) Equitable principles

In all major boundary delimitations the Courts have emphasized that the principles used in the delimitation process are equitable ones,[50] and consequently the natural prolongation and proportionality tests, and the half-effect and enclave remedies have been adopted. Yet in each case the equitable principles are subservient to the goal of an equitable solution, in which case if the equitable principle does not provide the necessary equitable solution then it is discarded for another until the desired result is obtained. In this context it is worthy to consider the words of the Court of Arbitration, when it noted that: "...even under Article 6 the question whether the use of the equidistance principle or some other method is appropriate for achieving an equitable delimitation is very much a matter of appreciation in the light of the geographical and other circumstances. In other words, even under Article 6 it is the geographical and other circumstances of a given case which indicate and justify the use of the equidistance method as the means of achieving an equitable solution rather than the inherent quality of the method as a legal norm of delimitation."[51] Consequently consideration will now be given to those special circumstances which dictate the use of certain delimitation techniques.

(e) Islands

As was noted previously,[52] one of the most important provisions to result from the 1982 Law of the Sea Convention was Article 121 and the recognition in that Article that islands, but not rocks which could not sustain human habitation or economic life,[53] were entitled to their own territorial sea, contiguous zone, exclusive economic zone or continental shelf.[54] This provision will undoubtedly lead to further disputes in the Aegean and East China Seas where the presence of islands and the effect to be given to them in boundary delimitations have led to continuing unresolved disputes. The effect that a small island will have on boundary delimitation negotiations was documented in a study by Ely, who noted that an island with a diameter of one mile and an area of .8 of a square mile would generate a 12 mile contiguous zone of 155 square miles,[55] and consequently one can understand why states such as Turkey, which have foreign islands lying off their coastline blocking access to a continental shelf or exclusive economic zone claims, wish to limit the amount of jurisdiction and sovereignty that an island is entitled to over the oceans.

The case studies have shown that various techniques have been developed so as to minimize the effect of islands. The territorial sea of the Australian islands which lie to the north of the Seabed Jurisdiction Line in the Torres Strait was restricted to three miles,[56] and they were granted no continental shelf rights but are within the extended fisheries jurisdiction line which gives Australia fisheries control over the central part of the Strait. It was only by Australia conceding its continental shelf rights and restricting the territorial seas of these islands that Papua New Guinea was able to gain access to the waters and seabed of the Torres Strait. The enclave solution was also adopted by the Court of Arbitration in the Channel Island case, where the Channel Islands were granted a 12 mile maritime zone to the north and west, thereby leaving France access to the seabed and fishing rights of the central Channel further to the north and west of the islands.[57]

The other method used to give less effect to islands in boundary delimitations has been the 'half-effect test'. This was first used in the delimitation between Iran and Saudi Arabia with respect to the island of Karg,[58] though the boundary was later modified to account for seabed mineral deposits. The half-effect test was used to effect by the Court of Arbitration in the case of the Scilly Islands[59] and also by the International Court with the Kerkennah Islands which lay off the Tunisian coastline.[60] As to which cases the half effect test should apply in, it seems to depend on how much of a distortion the island causes to the equidistance line; if its effect is considerable so as to create a gross disproportionality then it seems that the remedy is applicable. Once again this is a remedy which is required by equity. In its particular case, the Court of Arbitration noted that: "What equity calls for is an appropriate abatement of the disproportionate effects of a considerable projection on to the Atlantic continental shelf of a somewhat attenuated portion of the coast of the United Kingdom."[61]

Various solutions have been proposed with respect to this problem of islands and the effect they are to be given in boundary delimitations. Hodgson proposed a formula based on the size of the island, distinguishing between islets which are only to be granted partial or half effect in a delimitation,[62] and islands in excess of 1,000 square miles with a substantial population which are entitled to full effect because they "are mainland in the legal-geographical sense."[63] Karl[64] formulated a test in which he divided the seas between opposite or adjacent States into four zones of increasing distortion. In Zone A the island is entitled to a full territorial sea because of its proximity to the coast and it being within the territorial sea of the state to which it belongs. The island may also be used as a basepoint.[65] An island in Zone B, which lies between its own state's territorial sea and the median line, is also entitled to a territorial sea, but is not to be used as a basepoint in the drawing of the main boundary line.[66] An island in Zone C, which is in the region of the median/equidistance line, is similarly only entitled to a territorial sea due to the distortion it would cause to the main boundary line,[67] while finally an island in Zone D which lies totally in the maritime zone of the opposite or adjacent state is only entitled to its own territorial sea and is to have no effect whatsoever on the main boundary line.[68] The only exceptions to Karl's model are islands which constitute a substantial portion of a state's territory,[69] and for islands which have been traditionally recognized as entitled to historic rights.[70]

While these solutions to the problems caused by islands would be useful guides in cases such as the Aegean Sea and the Torres Strait, they have a limited value due to their failure to account for all the variable circumstances of each case.[71] As Symmons noted: "...the attempts to extrapolate supposedly objective formulae from existing State practice have limited value when they are proffered as solutions for the future; for their very rigidity inevitably fails to take into account all the circumstances which may be perceived to be relevant in a given situation or to cater for the manifold possibilities of the resultant treatment of an insular formation which such particular circumstances may be seen to warrant in solving insular basepoint problems."[72]

(f) Natural Prolongation

The presence of troughs and structural discontinuities in the seabed has been a matter of some dispute in continental shelf delimitations with the Hurd Deep in the English Channel[73] and the Mediterranean seabed adjacent to Tunisia and Libya[74] figuring prominently in the case studies. Currently the International Court is determining the Gulf of Maine dispute in which the United States argues on the basis of the natural prolongation test that the Northeast Channel is a sufficient discontinuity in the seabed to constitute a natural break in the continental shelf between Canada and the United States.[75] The significance of troughs and irregularities in the continental shelf, a matter which was noted in a 1957 Report to the First Law of the Sea Conference,[76] arises from the legal definition of the continental shelf in the 1958 Convention on the Continental Shelf, in which it was described as being: "...the seabed and subsoil of the submarine areas adjacent to the coast..."[77] and that in the 1982 Law of the Sea Convention which provides that the continental shelf extends: "...beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin."[78] Consequently if a coastal state is able to prove that its continental shelf legally extends to a certain point in the seabed and that the shelf of an adjacent or opposite state does not, then on the basis of this geographical factor an equitable solution would have to account for such a prolongation of a continental shelf in a boundary delimitation.

The natural prolongation argument is of great significance in the delimitation of the seabed surrounding the Timor Trough between Australia and Indonesia and the

Okinawa Trough between Japan and China. "In this context the doctrine of natural prolongation becomes critical, directing our attention to circumstances that may be described, because of their irregularity, as relevant and special. Consequently, where the geomorphology of the seabed located between two opposite States discloses a significant break, trench or trough, that structural discontinuity will, subject to appropriate scientific evidence being adduced as to the nature of the break, prima facie be treated as marking the limits of the continental shelves or margins of those States."[79]

The importance of the natural prolongation criterion is dismissed by some commentators who note the decided cases which determined that no structural discontinuity in the seabed existed, and that the criterion is only relevant as an entitlement factor which allows a coastal state to lay claim to a portion of the continental shelf.[80] Yet, the seabed features in those cases were not of the same dimensions as the Timor or Okinawa Troughs.[81] While the decision of the International Court in the Gulf of Maine case may add to the jurisprudence in this area it will be the resolution of the disputes concerning the Timor and Okinawa Troughs which will be of real significance for the natural prolongation test.

(g) Other geographical factors.

Another geographical factor which is relevant is the shape of the coastline, such as whether it is concave or convex,[82] whether exceptionally long promontories or capes have a distorting influence on the boundary line,[83] or if large bays or gulfs result in adjacent states becoming opposite states for the purpose of the boundary delimitation process.[84]

(h) Historic and Economic Factors

Though historic circumstances were rejected in the Tunisia-Libya Continental Shelf Case,[85] it is arguable that, with the newly created exclusive economic zone emphasizing the right of access to fishery resources, historic fishing rights will become of greater importance. Such a right was recognized in the Grisbadarna Case when the Court specifically considered the right of access of the Swedish and Norwegian fishermen to the fishing banks in the delimited area.[86] Also in the 1974 Fisheries Jurisdiction Case between Iceland and the United Kingdom, the International Court referred to the fact that: "State practice on the subject of fisheries reveals an increasing and widespread acceptance of the concept of preferential rights for coastal States, particularly in favour of countries or territories in a special situation of dependence on coastal fisheries."[87] In this respect the decision of the International Court in the Gulf of Maine Case will be looked forward to with anticipation to see how much weight the Court gives to this factor when delimiting a unified continental shelf and fisheries jurisdiction line.

As a consequence of these geographic, geological and historic factors which are all relevant circumstances to consider in a delimitation, various equitable principles have been developed to account for those factors. With respect to islands, both state practice and judicial determination have seen the enclave and half-effect remedy developed to account for the disproportionate effect that an island can have on an equidistance/median line. The natural prolongation test has also been developed to account for troughs or seabed depressions which constitute a significant break in the structural continuity of the continental shelf, while modified lines can be used to account for historic usage of a natural resource.

(i) Proportionality

One equitable principle developed by the International Court which has caused some controversy as to how and when it should be applied is the proportionality factor. In the North Sea Continental Shelf Cases the Court held that this factor was one: "...which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines, - these being measured according to the general direction in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions."[88] While the Court of Arbitration in the Anglo-French delimitation seemed to downplay the use of this principle,[89] it was a major factor for the International Court in determining whether the boundary line between Tunisia and Libya was equitable.[90] Noting the relationship of this factor with equity, the Court noted: "If the shelf areas below the low-water mark of the relevant coasts of Libya are compared with those around the relevant coasts of Tunisia, the resultant comparison will, in the view of the Court, make it possible to determine the equitable character of a line of delimitation."[91] The Court seems to be saying that the proportionality test is one that is used to determine whether the line drawn has resulted in an equitable solution to the delimitation problem.

Collins and Rogoff, who note that the delimitation of the Bay of Biscay is an example of an equidistance line and the proportionality factor being combined,[92] have determined that the joint equidistance-proportionality approach: "...begins with the construction of an equidistance line, the equity or inequity of which is then determined by comparing the seabed areas allocated to each State to the lengths of their coastlines. If the ratios of the seabed areas and the coastline lengths are out of proportion, the equidistance line is open to question. Under such circumstances, the factors causing the disproportionalty must be identified and assessed. When these factors are found to have an impact on the equidistance line that is out of proportion to their size or significance, they must be discounted in the construction of the final, or equitable, boundary line."[93]

Some doubt exists as to whether the proportionality factor is to be applied in all cases or just in certain circumstances. McRae uses, as a basis of his argument that the proportionality factor has no applicability in the Gulf of Maine dispute, the premise that the Court in the North Sea Continental Shelf Cases did not adopt: "...a broad principle that the share of continental shelf accorded to a state must be in proportion to its coastline, but the narrower principle that, in a situation of otherwise equality in respect of the length of the coastlines, the effect that concavity, convexity, or irregularity of coastal features has upon the size of the continental shelf that accrues to the state concerned must be considered."[94] Notwithstanding that the Court in the Tunisia-Libya Continental Shelf Case stated that the essence of the proportionalty doctrine was to compare "like with like",[95] the length of the respective coastlines upon which the compared coastline and seabed ratios were based was 185 kilometers to 420 kilometers in favour of Tunisia.[96] The consequent ratio of 31:69 can hardly be described as reflecting a situation of "otherwise equality" in the length of the coastlines. It will be of interest to see what effect the International Court gives to the proportionality factor in the Gulf of Maine case.

(j) A line perpendicular to the direction of the coast

Another equitable factor which has been used as a basis upon which to draw maritime boundaries from time to time has been a line perpendicular to the general direction of the coast. Such a line was used in the Grisbadarna Case, until it was discovered that it would cut across the offshore fishing banks. This problem was remedied by redirecting the boundary one degree.[97] Such a line received consideration in the Tunisia-Libya Continental Shelf Case when the International Court noted that: "...the factor of perpendicularity to the coast and the concept of prolongation of the general direction of the land boundary are, in the view of the Court, relevant criteria to be taken into account in selecting a line of delimitation calculated to ensure an equitable solution..."[98] While such a line is limited to those cases in which a relatively straight coastline exists on either side of the land frontier, and where the frontier meets the coast at 90° rather than on a sharp angle, it can provide a starting point for negotiations if the parties are prepared to modify or abandon the line at a later stage if it is inequitable.

(k) Previous boundary lines respected by the parties

Another equitable principle which the International Court made use of in the Tunisia-Libya Continental Shelf Case, was the previous attitude of the parties as to how the boundary should be drawn. The Court emphasized the importance of a 1919 fisheries line which was recognized by France and Italy[99] and also a de facto line drawn at 26° from the land frontier, which resulted from the manner in which both parties granted oil concessions during the 1960's and 1970's[100], as relevant factors to consider when drawing the first sector of the maritime boundary.[101] While this approach has been criticized,[102] it must be acknowledged that a delimitation which takes into account all of these relevant factors and produces a boundary that in part was generally agreed to by the parties at one time is more of an equitable solution than delimiting a boundary in a manner which is contrary to the general wishes of the parties.

3. THE EXCLUSIVE ECONOMIC ZONE: UNIFIED OR SEPARATE MARITIME BOUNDARIES?

As previously noted, the impact of the 1982 Law of the Sea Convention will be comparatively small upon the actual delimitation principles involved in maritime boundary delimitations between States, but where it will have a considerable impact is in the recognition of extended maritime zones. The territorial sea and contiguous zone, which are now recognized as extending twelve[103] and twenty-four[104] miles offshore respectively should create little trouble between States as they extend these zones from their previous limits, especially as the delimitation techniques outlined in Article 15 are substantially similar to the customary law and that in Articles 12 and 24 of the 1958 Convention on the Territorial Sea and Contiguous Zone.

The recognition by the Convention of a 200 mile Exclusive Economic Zone[105] will have a considerable impact on boundary delimitation, irrespective of whether the Convention enters into force or not, because it is arguable that the Zone is now part of customary international law.[106] The unique feature of the E.E.Z. is that it creates a regime of joint jurisdiction over the natural resources of the seabed and the waters superjacent to it.[107] Consequently the E.E.Z. overlaps the continental shelf regime in its jurisdiction over the seabed.

The 1982 Convention also specifies the width of the continental shelf regime in much greater detail than the 1958 Convention,[108] providing that the continental shelf shall have a minimum limit of 200 miles[109] and a maximum of 350 miles or 100 miles from the 2,500 metre isobath.[110] Consequently it is conceivable that separate lines will have to be drawn for both the E.E.Z. and continental shelf. The issue that arises is whether different equitable factors will be relevant for the delimitation between states of the two regimes, with the result that a seabed jurisdiction line will differ from the E.E.Z. line,[111] especially in those cases where States are separated by stretches of water less than 400 miles in width. While factors such as the dependence of fishery species on the environment of the seabed and the need for national laws to be administered over a unified zone of jurisdiction[112] point to the practicality of having unified continental shelf and E.E.Z.

boundaries, these factors did not deter Australia and Papua New Guinea from providing that Australia had fisheries jurisdiction within a zone of Papua New Guinea seabed jurisdiction.[113]

It would seem that new equitable principles may have to be developed in the future to deal with E.E.Z. delimitations between states, due to the current principles being primarily suited to continental shelf boundaries. The factors of historic usage and economic dependence on the fishery resources may be of greater significance to E.E.Z. delimitations. It has been noted that, due to the complexity of the new regime, an: "...effective economic zone boundary solution must accomodate the reality of a unified and independent ocean environment. The area enclosed within one nation's economic zone is but one fragment of a complete and fragile marine ecosystem, extending seaward into the mid-ocean and laterally across zones of national jurisdiction. Any attempts to administer artificial boundaries without international co-operation will prove futile, thereby risking destruction of the vital economic zone resources which a nation seeks to control unilaterally."[114]

4. **CONCLUSION: THE CURRENT STATE OF THE LAW**

It is now possible to determine what the current state of the law is and how States should go about delimiting the maritime boundaries which exist between them. The parties should always seek to delimit the boundary on the basis of agreement and only after long and unsuccessful negotiations should they submit the matter to a third party, as a negotiated agreement is always more likely to satisfy than one which has been imposed. The goal to be sought is an equitable solution which takes into account all of the relevant circumstances of the case. In reaching this solution, equitable principles are to be applied, but in such a fashion that if they do not achieve an equitable solution they can be discarded in favour of others. As a basis upon which to begin negotiations a median or equidistance line can be drawn. This is not the only line that can be drawn, a line perpendicular to the coast has credibility in some cases, but the equidistance line is more able to account for the various coastal features which may exist. If the equidistance line does not adequately account for those features so that it results in a disproportionate delimitation of the waters and seabed compared to the coastline, then the line can be modified or discarded. In the case of islands which if given their full effect would result in a disproportionate delimitation, their presence can be diminished by the 'half-effect test' and variations thereof, and by the creation of enclaves. The natural prolongation test is also a valuable criterion for determining the outer limits of the boundary in a continental shelf delimitation. Other factors such as the shape of the coastline, historic fishing rights, mineral resources, economic considerations and the wishes of the parties, can also be considered so as to obtain an equitable solution. When the determined line has been delimited, the proportionality test can be applied to ensure that an equitable solution has been achieved.[115] This method of delimitation is currently acceptable for the territorial sea, contiguous zone, E.E.Z. and the continental shelf, though some of these factors will be more relevant than others in the actual delimitation of each zone.

While the forthcoming decision of the International Court of Justice in the Gulf of Maine case is unlikely to have a great effect on the law it may clarify certain points. Of particular interest will be the Court's ruling on natural prolongation and the Northeast Channel, Canada's use of an equidistance line to diminish the effect of Cape Cod and Nantuckett Island, the impact of historic fishing rights upon a unified fisheries and continental shelf boundary, and the use of the proportionality factor in a situation where there is no distinct cut off point for the two adjacent coastlines.

Following the developments of the Third United Nations Conference on the Law of the Sea and the growth in the customary law, 376 potential maritime boundaries were identified in 1982, of which only approximately 90 had been negotiated.[116] Consequently it has been noted that: "...every coastal state in the world will eventually have to negotiate at least one maritime boundary with at least one neighbour. Under the regimes of narrow territorial seas, contiguous zones, and the continental shelf, a few States could create maritime zones without direct contact with neighbours. This situation will no longer prevail. As a result, issues and principles of boundary delimitation are concerns of all coastal states. Not all maritime boundary delimitations will be troublesome or engender disputes. No state, however, will be immune from the effects of the delimitation principles as they currently exist in international law..."[117] It is for this reason that it is important for the law to be settled so that when the delimitation process begins, states will know what principles to use as they negotiate these maritime boundaries with their neighbours.

S. Whittemore Boggs wrote in 1940 that: "In order that boundary problems may be amicably solved, every conceivable factor should be taken into consideration when new frontiers are to be established, and the best human wisdom should be applied in placing the boundary where it promises to function with least friction and to occasion a minimum of expense."[118] Though these words were written with respect to land frontiers they apply just as much to the boundaries of the sea. By adhering to those thoughts and following the guidelines on delimitation as they exist today in international law, the many maritime boundaries in the world which are still to be settled should be peacefully resolved.

FOOTNOTES

1 Supra. Chapter 2, notes 2 and 3

2 The Oregon Boundary Treaty between Great Britain and the United States, signed at Washington, 15 June 1846, 100(1846) C.T.S. 39

3 The San Juan Water Boundary: Arbitration under Articles XXXIV - XLII of the Treaty of 8 May 1871, in, Moore, History and Digest of the International Arbitrations to which the United States have been a Party, 196 - 236 (1898)

4 Arbitral award in the question of the delimitation of a certain part of the maritime boundary between Norway and Sweden, 23 October 1909, in, Scott, The Hague Court Reports, 121(1916); also, 11 U.N.R.I.A.A. 147

5 Rhee, Sea Boundary Delimitation Between States Before World War II, 76(1982) A.J.I.L. 555 at 571

6 Presidential Proclamation No. 2667, Concerning the Policy of the United States with respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, in, United Nations Legislative Series, Laws and Regulations on the Regime of the High Seas, U.N. Doc. No. ST/LEG. SER. B/1, p. 38

7 Supra. Chapter 2, Part 6, notes 98 - 106

8 Boggs, Delimitation of Seaward Areas Under National Jurisdiction, 45(1951) A.J.I.L., 240 at 256 - 258

9 Report of the International Law Commission to the General Assembly, U.N. Document No. A/3159, also, Yearbook of the International Law Commission: 1956, Volume II, p. 253

10 Articles 12, 14, 72

11 Supra. n.9, Chapter II-III, Part I - Article 14

12 Articles 12 and 24, Convention on the Territorial Sea and Contiguous Zone, U.N. Doc. No. A/CONF. 13/L.52, also, 516 U.N.T.S. 205

13 Article 6, Convention on the Continental Shelf, U.N. Doc. No. A/CONF. 13/L.55, also, 499 U.N.T.S. 311

14 Grisel, The Lateral Boundaries of the Continental Shelf and the Judgment of the International Court of Justice in the North Sea Continental Shelf Cases, 64(1970) A.J.I.L., 562 at 579. See: Op Cit. Rhee, p. 580 - 585, and the discussion of the North Sea Continental Shelf Cases, the Anglo-French Continental Shelf Delimitation, and the Tunisia - Libya Continental Shelf Case in Chapter 5 for an insight as to why the equidistance line is inapplicable in some cases.

15 North Sea Continental Shelf Judgment, I.C.J. Reports 1969, p. 3

16 Ibid. p. 49, para. 89

17 Ibid. p. 54 - 55, para. 101, C.D.

18 Ibid. p. 50, para. 93

19 Arbitration between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of 30 June 1977, 18(1979) I.L.M. 397

20 Ibid. p. 444 - 445, para. 201 - 202; p. 455, para. 249

21 Ibid. p. 421, para 68

22 Ibid. p. 428, para. 108

23 Ibid. p. 441, para. 182

24 Continental Shelf (Tunisia/Libya Arab Jamahiriya), Judgment, I.C.J. Reports 1982, p. 18

25 Ibid. p. 92, para 132

26 Ibid. p. 59, para. 70

27 Ibid. p. 79, para. 110

28 Ibid. p. 85 - 86, para. 121

29 Ibid. p. 89, para. 129

30 Supra. Chapter 5, note 231

31 Agreement Concerning Sovereignty over Al-'Arabiyah and Farsi Islands and Delimitation of Boundary Line Separating Submarine Areas between the Kingdom of Saudi Arabia and Iran, signed at Teheran, 24 October 1968, 8(1969) I.L.M. 403 - 496

32 Agreement delimiting the continental shelf boundary between the Government of the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland, signed in London, 10 March 1965, in, New Directions in the Law of the Sea: Documents - Volume 1, ed. Houston Lay, Churchill, Nordquist, p. 120 - 121(1973)

33 Agreement establishing a continental shelf boundary in the Adriatic Sea between the Governments of Italy and Yugoslavia, signed at Rome, 8 January 1968, in, Ibid. p. 112 - 115

34 U.N. Doc. No. A/CONF. 62/122, also, Simmonds, U.N. Convention on the Law of the Sea 1982 (1983)

35 Supra. Chapter 6, note 70 - 74

36 Supra. Chapter 6, note 77

37 Hodgson, International Ocean Boundary Disputes, in, The Oceans and U.S. Foreign Policy, 40(1978)

38 Charter of the United Nations and the Statute of the International Court of Justice, U.N. Publication No. DPI/511

39 Supra. n. 24, p. 59, para. 70

40 As of October 1983, 6 countries had ratified the Convention; No. 1, 21(1984) U.N. Chronicle 101

41 See: for a discussion of the future of the Law of the Sea Convention; Gamble, Where Trends the Law of the Sea?, 10(1981 - 1982) Ocean Development and International Law, 61 at 75 - 78; Grolin, The Future of the Law of the Sea: Consequences of a Non-Treaty or Non-Universal Treaty Situation, 13(1983) Ocean Development and International Law, 1 - 31

42 Supra n. 12 - 14

43 Supra. n. 15, p. 79, para. 109

44 Ibid. p. 79, para. 110

45 Collins and Rogoff, The International Law of Maritime Boundary Delimitation, 34(1982) Marine Law Review, 1 at 17

46 Supra n. 34. Article 74(2), 83(2), 279 - 299

47 Op Cit. Hodgson, p. 42

48 Supra. Chapter 5, Part 3 - Maritime Boundary Dispute in the Aegean Sea Between Greece and Turkey

49 Supra. n. 26 and n. 39

50 Supra. n. 15, p. 53, para. 101(c)(1)

51 Supra. n. 19, p. 421, para.70

52 Supra. Chapter 5, n. 490 - 508

53 Supra. n. 34, Article 121(3)

54 Ibid. Article 121(2)

55 Ely, Seabed Boundaries Between Coastal States: The Effect to be Given Islets as "Special Circumstances", 6(1972) International Lawyer, 219 at 234

56 Article 3(2), Treaty Between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two countries, including the area known as Torres Strait, and related matters, signed in Sydney, 18 December 1978, 18(1979) I.L.M. 291

57 Supra. n. 19, p. 444 - 445, para. 201 - 202

58 Young, Equitable Solutions for Offshore Boundaries: The 1968 Saudi Arabia - Iran Agreement, 64(1970) A.J.I.L., 152 at 155

59 Supra. n. 19, p. 455, para 251

60 Supra. n. 24, p. 89, para. 129

61 Supra. n. 19, p. 455, para. 249

62 Hodgson, Islands: Normal and Special Circumstances, in, Law of the Sea: The Emerging Regime of the Oceans, eds. Gamble and Pantecorvo, 170 - 173(1973)

63 Ibid. p. 173

64 Karl, Islands and the Delimitation of the Continental Shelf: A Framework for Analysis, 71(1977) A.J.I.L., 642 at 673

65 Ibid. p. 655

66 Ibid. p. 657

67 Ibid. p. 658 - 659

68 Ibid. p. 661 - 662

69 Ibid. p. 662

70 Ibid. p. 664

71 See: Chapter 5 for a discussion of the problems caused by islands in the Anglo-French Arbitration (where the Scilly Islands were found to have a disproportionate effect on the boundary line drawn between the two most western points of the United Kingdom and France), the attitude that was adopted by Australia and Papua New Guinea towards those Australian islands which lie only a few miles off the Papua New Guinea coast, and the continuing problems between Greece and Turkey over the many Greek islands which are adjacent to the Turkish coastline. These are just some examples of cases in which the Hodgson and Karl proposals are not totally applicable.

72 Symmons, The Maritime Zones of Islands in International Law, 207 - 208 (1979)

73 Supra. n. 19, p. 409, para. 9, 11, 12; p. 428, para. 106 - 107

74 Supra. n. 24, p. 52 - 58, para. 59 - 67

75 Supra. Chapter 5, n. 404

76 Scientific Considerations Relating to the Continental Shelf, Memorandum by the Secretariat of the United Nations Educational, Scientific and Cultural Organization, U.N. Doc. No. A/CONF. 13/2 and Add. 1

77 Article 1, Supra n. 13

78 Article 76(1), Supra. n. 34

79 Lumb, The Delimitation of Maritime Boundaries in the Timor Sea, 7 A.Y.I.L. 72 at 83; for a discussion of the Okinawa Trough, See: Feulner, Delimitation of Continental Shelf Jurisdiction Between States: The Effect of Physical Irregularities in the Natural Continental Shelf, 17(1976) Va.J.I.L. 77 at 102

80 See: Op Cit. Collins and Rogoff, p. 32; and; Belcher, Equitable Delimitation of Continental Shelf, 73(1979) A.J.I.L. 60 at 63

81 The Timor Trough: "...is up to 3400 metres in depth, with the greater part of the area being within the 2000 metres iosbath.", Op Cit. Lumb, p. 72; See: Goldie, The International Court of Justice's 'Natural Prolongation' and the Continental Shelf Problem of Islands, 4(1973) Netherlands Yearbook of International Law, 237 at 252, where it is noted that the depth of the Okinawa Trough can reach 2717 metres

82 See: Supra. n. 15, p. 17 - 18, para. 8

83 See: Supra. n. 19, p. 454, para. 244. See also in Chapter 5, the Canadian argument in the Gulf of Maine Case regarding the distortion caused by Cape Cod.

84 See: Supra. n. 24, p. 89, para. 129 for the International Court's use of the 'Half-effect test' in a situation where for the purposes of the delimitation, Tunisia and Libya had become opposite states; also, See: Op Cit. Collins and Rogoff, p. 38 - 44

85 Supra. n. 24, p. 76, para. 104; though the Court noted: "Historic titles must enjoy respect and be preserved as they have always been by long usage." (p. 73, para. 100), it did not find the argument applicable on the facts in this case.

86 Supra. n. 4, p. 130 - 132

87 Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 26, para. 58, and, *See:* Brown, The Anglo-French Continental Shelf Case, 16(1979) *S.D.L.R.* 461 at 494

88 Supra. n. 15, p. 52, para. 98

89 Supra. n. 19, p. 427, para. 99 - 101

90 Supra. n. 24, p. 91, para 130 - 131

91 Ibid. p. 76, para. 104

92 Op Cit. Collins and Rogoff, p. 48 - 51. *See:* Convention between the Government of the French Republic and the Government of the Spanish State on the Delimitation of the Continental Shelves of the Two States in the Bay of Biscay, in, *New Directions in the Law of the Sea: Documents - Volume V*, eds. Churchill, Nordquist, Houston Lay, 251 - 260 (1977)

93 Ibid. p. 33

94 McRae, Proportionality and the Gulf of Maine Maritime Boundary Dispute, 19(1981) *C.Y.I.L.* 287 at 295

95 Supra. n. 24, p. 91, para. 130

96 Ibid. p. 91, para. 131

97 Supra. n. 4, p. 132

98 Supra. n. 24, p. 85, para. 120

99 Ibid. p. 70, para. 93

100 Ibid. p. 71, para. 96

101 Ibid. p. 84, para. 118

102 See: Feldman, The Tunisia-Libya Continental Shelf Case: Geographic Justice of Judicial Compromise? 77(1983) A.J.I.L., 219 at 133 - 234; Chcristie, From the Shoals of Ras Kaboudia to the Shores of Tripoli: The Tunisia/Libya Continental Shelf Boundary Delimitation, 13(1983) Georgia Journal of International and Comparative Law, 1 at 28

103 Supra. n. 34, Article 3

104 Ibid. Article 33(2)

105 Ibid. Article 57. Hereafter the 'Exclusive Economic Zone' is referred to as the E.E.Z.

106 See: Op Cit. Grolin, p. 8 - 13

107 Supra. n. 34, Article 56(1)(a)

108 See: Supra. n. 13, Article 1

109 Supra. n. 34, Article 76(1)

110 Ibid. Article 76(5)

111 See: Bowett, The Legal Regime of Islands in International Law, 188 - 189(1979)

112 Op Cit. Lumb, p. 85

113 Supra. n. 56, Articles 4; note especially Article 4(3)

114 Butler, Boundary Delimitation in the Economic Zone: The Gulf of Maine Dispute, 30(1979) Maine Law Review, 207 at 245

115 See: for a comparison of how the law has developed over 400 years, the delimitation techniques proposed by Sarpi, noted in Chapter 2 and found in; Fulton, The Sovereignty of the Sea, 547(1911)

116 Smith, A Geographical Primer to Maritime Boundary - Making, 12(1982) Ocean Development and International Law, 1 at 3

117 Hodgson and Smith, Boundary Issues Created by Extended National Maritime Jurisdiction, 69(1979) Geographical Review, 423 at 423

118 Boggs, International Boundaries - A Study of Boundary Functions and Problems, 204(1940)

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